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Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

MUSTANG FUEL CORPORATION (formerly MUSTANG ENERGY CORP.),
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.
Respondent.

———

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES REQUIRED BY RULE 28.1

———

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2259

MUSTANG ENERGY CORP., formerly known as MUSTANG FUEL,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

EL PASO NATURAL GAS COMPANY,
Intervenor.

APPEAL FROM THE FEDERAL ENERGY REGULATORY COMMISSION

(Docket No. ST81-260)

[Filed Oct. 17, 1988]

David O. Cordell, Mustang Energy Corp., Oklahoma City, Oklahoma, and Carroll L. Gilliam, Grove, Jaskiewicz, Gilliam & Cobert, Washington, D.C. (Craig W. Hulvey and George C. Garikes, Grove, Jaskiewicz, Gilliam & Cobert, Washington, D.C., with them on the briefs), for Petitioner.

Joanne Leveque (Jerome M. Feit, Solicitor, and Catherine C. Cook, General Counsel, with her on the brief),

Federal Energy Regulatory Commission, Washington, D.C., for Respondent.

Before ANDERSON and BALDOCK, Circuit Judges, and PARKER,* District Judge.

ANDERSON, Circuit Judge.

Mustang Energy Corporation ("Mustang") petitions for review under 15 U.S.C. § 3416(a)(4) of orders of the Federal Energy Regulatory Commission ("FERC") establishing "fair and equitable" rates for the transportation of natural gas by Mustang and ordering refunds. We affirm the FERC orders in most respects but modify the orders in part.

I.

Mustang is an intrastate pipeline transporting natural gas in the state of Oklahoma. Prior to 1981, Mustang transported gas from gas producing areas to electrical generating plants for Oklahoma Gas and Electric Company ("OG&E"). In 1981, Mustang entered into a Transportation Agreement with El Paso Natural Gas Company ("El Paso"). The Transportation Agreement primarily relied on excess capacity in Mustang's existing facilities, but also required Mustang to construct a new segment of pipeline, an additional compressor station and certain gathering lines. On September 30, 1981, Mustang began transporting gas on behalf of El Paso pursuant to section 311(a)(2) of the Natural Gas Policy Act of 1978 ("NGPA"). 15 U.S.C. § 3371(a)(2). At issue here is FERC's determination of "fair and equitable" rates for transportation service under the NGPA.

Section 311(a)(2) allows the Commission to authorize an intrastate pipeline to transport natural gas on behalf of an interstate pipeline or local distribution company

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* Hon. James A. Parker, U.S. District Court, New Mexico, sitting by designation.

without triggering general FERC jurisdiction under the Natural Gas Act. Section 311(a)(2) provides as follows:

> "§ 3371 (a)(2)(A) In general. The Commission may, by rule or order, authorize any intrastate pipeline to transport natural gas on behalf of
>
> (i) any interstate pipeline; and
>
> (ii) any local distribution company served by any interstate pipeline.
>
> (B) Rates and charges.
>
> (i) Maximum fair and equitable price. The rates and charges of any intrastate pipeline with respect to any transportation authorized under subparagraph (A), including any amount computed in accordance with the rule prescribed under clause (ii), shall be fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.
>
> (ii) Commission Rule. The Commission shall, by rule, establish the method for calculating an amount necessary to
>
> (I) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, delivery, or similar service provided by such pipeline in connection with any transportation of natural gas authorized under subparagraph (A); and
>
> (II) provide an opportunity for such pipeline to earn a reasonable profit on such services."

15 U.S.C. § 3371.[1] *See also* 15 U.S.C. § 3431(a)(2)(A)(ii) (transportation authorized under § 3371(a) is not

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[1] The applicable regulations implementing the "fair and equitable" standard of this statutory provision are found at 18 C.F.R. § 284.123:

"(a) *General Rule.* Rates and charges for transportation of natural gas authorized § 284.122(a) shall be fair and equitable as determined in accordance with paragraph (b) of this section.

(b) *Election of rates.* (1) Subject to the conditions in §§ 284.8 and 284.9 of this chapter, an intrastate pipeline may elect to:

(i) Base its rates upon the methodology used:

(A) In designing rates to recover the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service) included in one of its then effective firm sales rate schedules for city-gate service on file with the appropriate state regulatory agency; or

(B) In determining the allowance permitted by the appropriate state regulatory agency to be included in a natural gas distributor's rates for city-gate natural gas service; or

(ii) To use the rates contained in one of its then effective transportation rate schedules for intrastate service on file with the appropriate state regulatory agency which the intrastate pipeline determines covers service comparable to service under this subpart.

(2)(i) *If an intrastate pipeline does not choose to make an election under paragraph (b)(1) of this section, it shall apply for Commission approval, by order, of the proposed rates and charges by filing with the Commission the proposed rates and charges, and information showing the proposed rates are fair and equitable . . . . Upon filing the petition for approval, the intrastate pipeline may commence the transportation service and charge and collect the proposed rate, subject to refund.*

(ii) *150 days after the date on which the Commission received an application filed pursuant to paragraph (b)(2)(i) of this section, the rate proposed in the application will be deemed fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service, unless within the 150 day period, the Commission either extends the time for action, or institutes a proceeding in which all interested parties will be afforded an opportunity for written comments and for the oral presenta-

subject to Natural Gas Act jurisdiction); *Lear Petroleum Corp.*, 42 FERC ¶ 61,015 at 61,043 (1988) (purpose of Section 311(a)).

According to the legislative history of the NGPA, this provision

> "facilitates development of a national natural gas transportation network without subjecting intrastate pipelines, already regulated by State agencies, to [FERC] regulation over the entirety of their operations. Instead, the intrastate pipelines are immunized from State or Federal regulation as common carriers and from [FERC] regulation under the Natural Gas Act. The intrastate pipelines are only subjected to [FERC] regulation under this legislation to the extent the intrastate pipeline is involved in an authorized sale of natural gas to interstate pipelines or an authorized transportation of natural gas on behalf of interstate pipelines."

H. Rep. No. 95-543, 95th Cong. 1st Sess. 45 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7712.[2]

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tion of views, data and arguments. In such proceeding, the Commission either will approve the rate or disapprove the rate and order refund, with interest, of any amount which has been determined to be in excess of those shown to be fair and equitable or in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service."

18 C.F.R. § 284.123 (emphasis added). Because Mustang's transportation charges were not regulated by any state authority, Mustang filed with FERC under section (b)(2)(i) seeking approval of its proposed rates as fair and equitable. Other regulatory provisions impose reporting requirements on intrastate pipelines seeking to transport natural gas under NGPA § 311(a).

[2] *See generally* Peters, Interstate and Intrastate Pipeline Transportation and Sale of Gas Under Section 311 of the Natural Gas Policy Act of 1978, 2 *J. Energy Law & Pol'y* 143, 153-55 (1982); 1 American Gas Ass'n, *Regulation of the Gas Industry* § 8.04[2] (1987).

This provision was adopted by the Conference Committee, but the conference report provides little additional guidance regarding the "fair and equitable" standard to be applied to transportation charges.[3]

Pursuant to FERC regulations, Mustang filed for approval of a proposed transportation rate of 22.29 cents per Mcf for the first two years of the Transportation Agreement. On May 20, 1982, FERC issued an order authorizing the transportation and approving the proposed rate for a one-year period, and directing Mustang to file an application each year to justify the existing rate or any change in the transportation rate. *Mustang Fuel Corp.*, 19 FERC ¶ 61,168, *clarified on rehearing*, *Mustang Fuel Corp.*, 20 FERC ¶ 61,057 (1982). The Transportation Agreement approved by FERC also included a "minimum bill" provision, whereby El Paso was charged each month for transportation of a "minimum daily quantity" [4] whether or not that volume was actually transported and delivered to El Paso.

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[3] "The conference agreement also gives the Commission authority to authorize intrastate pipelines to transport natural gas on behalf of any interstate pipeline, and any local distribution company served by any interstate pipeline. The rates and charges for such transportation are required to be fair and equitable, as defined. They may not exceed an amount which is determined by the Commission to be reasonably comparable to the rates and charges which any interstate pipeline would be permitted to charge for providing a similar transportation service. Such a transaction would not affect the exempt status of any party to the transaction under the Natural Gas Act."

H. Conf. Rep. No. 1752, 95th Cong. 2d Sess. 107, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9023.

[4] The minimum daily quantity was 130,000 Mcf through May 22, 1983 and 58,000 Mcf through April 30, 1984. The minimum daily quantity was "equal to the aggregate minimum volumes which El Paso is required to take or pay for under its contracts with OG&E and independent producers. This minimum daily quantity was to be redetermined at least annually on the basis of El Paso's estimated throughput volumes." Brief of Petitioner at 13.

On September 30, 1982, Mustang filed a petition for rate approval seeking to increase the transportation rate to 32.21 cents per Mcf, effective October 1, 1982. Upon filing, the increased rate became effective and Mustang collected that rate from El Paso, subject to refund. On May 23, 1983, Mustang once again filed for a rate increase, seeking approval of a rate of 34.30 cents per Mcf. Again, this increase became effective upon filing, subject to refund. On May 1, 1984, Mustang filed for another change in the transportation rate. The May, 1984 filing, and any subsequent filings by Mustang, are not the subject of this petition. Thus, this court is concerned only with the proper transportation rates for two "locked-in" periods, October 1, 1982 through May 22, 1983, and May 23, 1983 through April 30, 1984. Rates subsequent to April 30, 1984 are not considered here.

Pursuant to its regulations, FERC instituted rate proceedings and convened staff panels to review the Mustang filings. *See, e.g., Mustang Fuel Corp.*, 22 FERC ¶ 61,231 (1983) (order instituting rate proceedings on September 30, 1982 filing). The two proceedings were ultimately consolidated and heard by a FERC staff panel on May 30, 1984. Mustang and the Commission staff were given the "opportunity for oral presentations of data, views, and arguments concerning both proposed rate increases." *Mustang Fuel Corp.*, 31 FERC ¶ 61,265 at 61,527 (1985). FERC ultimately issued an order setting fair and equitable rates on June 4, 1985. That order established a fair and equitable rate for the first period—October 1, 1982 through May 22, 1983—of 28.93 cents per Mcf, and for the second period—May 23, 1983 through April 30, 1984 —of 33.75 cents per Mcf, and ordered Mustang to pay refunds for excess collections. FERC also invalidated the minimum bill provision and ordered Mustang to refund any charges collected for natural gas not actually transported for El Paso.[5] Finally, FERC ordered Mustang to

[5] FERC also invalidated the minimum bill for the period prior to October 1, 1982, and ordered a refund for collections under the

pay interest on the refunded amounts. *Id.* at 61,535. According to Mustang, the refund obligation totals more than $8 million, plus accumulated interest. Brief of Petitioner at 18 n.26.

Mustang urges us to reverse the FERC orders reducing the transportation rate and eliminating the minimum bill provision. Mustang argues (1) that the rates approved by FERC violate the substantive standard of section 311(a)(2), that is, that they are not "fair and equitable"; (2) that elimination of the minimum bill provision also violates the same substantive standard; (3) that the Commission applied an improper methodology to determine the fair and equitable transportation rate, or, in the alternative, improperly applied its own methodology; (4) that the Commission improperly ordered refunds and assessed interest; and (5) that the Commission's procedures denied Mustang due process of law.

Apparently, we are the first court to consider the "fair and equitable" rate standard of section 311(a)(2).[6] Thus

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minimum bill provision during the first year of the Transportation Agreement. On rehearing, FERC found that the language of its earlier orders could be read as approving the minimum bill provision for that period and it vacated the initial refund order. *Mustang Fuel Corp.*, 36 FERC ¶ 61,001, at 61,004-05 (1986). Thus, Mustang was allowed to collect from El Paso under the minimum bill provision until October 1, 1982.

[6] We previously considered the NGPA, including section 311, in *Oklahoma v. FERC*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982), where we upheld certain provisions of the NGPA against a constitutional challenge. In addition, courts have considered various NGPA regulations promulgated by FERC, including some related to section 311. *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981, 1001-03 (D.C. Cir. 1987) (reviewing FERC regulations), *cert. denied*, 108 S. Ct. 1468 (1988); *Laclede Gas Co. v. FERC*, 722 F.2d 272, 275-76 (5th Cir. 1984) ("rolled-in" pricing of section 311 gas). However, neither the parties nor this court have been able to identify any prior judicial consideration of the "fair and equitable" standard.

our review focuses on two questions: first, has FERC properly interpreted the statutory language; and second, has FERC properly applied the statutory standard in this case?

II.

Our standard of review is necessarily deferential to FERC's interpretation of the statutory language.

> "Our first inquiry is whether 'Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). We will defer when an agency has chosen between alternative possible constructions of an ambiguous statute:
>
> > 'If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'
>
> *Chevron, U.S.A.*, 467 U.S. at 843 (footnotes omitted). Where the plain words of the statute do not answer a particular question, the agency interpretation must be reasonable, but it need not be the only reasonable interpretation or the interpretation that the reviewing court would adopt. *See, e.g., Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). A reviewing court will defer to an agency interpretation of an ambiguous statute unless the agency interpretation is con-

> trary to the policies Congress sought to implement in enacting the statute."

Martin Exploration Management Co. v. FERC, 813 F.2d 1059, 1065 (10th Cir. 1987) (citations omitted), *rev'd on other grounds*, 108 S. Ct. 1765 (1988);[7] *cf. South Carolina Public Service Auth. v. FERC*, 850 F.2d 788, 791 (D.C. Cir. 1988); *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 246-47 (D.C. Cir. 1988). For reasons explained below, we find that the "fair and equitable" standard in section 311(a)(2) is subject to a variety of interpretations. Accordingly, we review FERC's interpretation of that language to determine (1) if it is reasonable, and (2) if it is contrary to Congressional policies.

In section 311(a)(2) Congress directed FERC to establish "fair and equitable" rates for intrastate pipelines transporting natural gas in interstate commerce.[8] In

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[7] Despite this deferential standard of review, in *Martin* this court reversed FERC's interpretation of certain NGPA provisions as "contrary to the clear intent of Congress." *Martin*, 813 F.2d at 1065. On appeal, the Supreme Court reversed our decision and reinstated FERC's interpretation of the statute. *See Martin* 108 S. Ct. at 1768-69.

[8] One commentator has suggested that the "fair and equitable" standard is essentially an empty standard.

> "An incident that occurred during the long and tortuous negotiations that led to the passage of the Natural Gas Policy Act of 1978 . . . helps to illustrate the empty nature of 'do right' standards like 'just and reasonable.' Congress decided that it wanted to authorize sales of natural gas from intrastate pipelines to interstate pipelines, subject to FERC regulation of the price charged for such sales, but the legislature was in hopeless disagreement concerning the standard that FERC should use in regulating the price at which such sales are made. Congress considered and rejected use of the Natural Gas Act's 'just and reasonable' standard, which had been used for similar purposes for the prior four decades. Legislators in favor of generous price regulation objected because of the existence of many court decisions applying the just and rea-

addition, the rates "may not exceed an amount which is reasonably-comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service."[9] The statute also imposes two substantive components of the "fair and equitable" standard. First, the rate must "reason-

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sonable standard in a manner that seemed to permit or require an agency to set prices at artificially low levels. *E.g., The Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) (affirming rates based on average historical costs). Legislators who preferred stringent price regulation objected because of the many other court decisions applying the standard in a manner that appeared to permit inflated prices. *E.g., American Public Gas Ass'n v. FPC,* 567 F.2d 1016 (D.C. Cir.) (affirming rates based on projected future costs), *cert. denied,* 435 U.S. 907 (1977). Because the legislators could not agree on a real standard, and because each objected to some interpretations of the traditional empty standard, they could avoid impasse only by adopting a new empty standard. Thus was born the 'fair and equitable' standard contained in [§ 311 of the Natural Gas Policy Act]."

Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 *Tex. L. Rev.* 469, 474 n.18 (1985).

We make no comment on Professor Pierce's characterization of the standard apart from noting that the statutory language leaves substantial discretion to FERC in the setting of transportation rates.

[9] According to section 311(a)(1)(B), an interstate pipeline providing similar transportation service would be allowed to charge rates that are "just and reasonable (within the meaning of the Natural Gas Act)." Thus, despite Congress' choice of different words to describe the rate for intrastate pipelines, the statute suggests that the two standards are, at least, "reasonably comparable."

Moreover, the language of this clause—"may not exceed"—suggests that the comparison with interstate rates is to serve as an upward limit on "fair and equitable" rates. *See Mustang Fuel Corp.,* 31 FERC at 61,534. Because the argument here is that the approved rates are too low, we do not have occasion to examine this provision of the statute in detail.

ably compensate any intrastate pipeline for expenses incurred." Second, the rate must "provide an opportunity for such pipeline to earn a reasonable profit on such services." FERC's adjudications under section 311(a)(2) consistently recognize these statutory standards. *See Mustang Fuel Corp.*, 31 FERC at 61,527. Unfortunately, however, neither FERC regulations nor adjudications provide a clear, concise statement of the Commission's interpretation of the statute. FERC commonly discusses the question in general terms, with reference to the statutory language:

> "Section 311(a)(2) of the NGPA requires that a rate charged by an intrastate pipeline for transportation service rendered on behalf of an interstate pipeline or a local distribution company must be 'fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.' A 'fair and equitable' rate is defined in the Statement of Managers for the NGPA as one that reasonably compensates an intrastate pipeline for expenses incurred by the pipeline for providing the service plus an opportunity for the pipeline to earn a reasonable profit."

Mustang Fuel Corp., 19 FERC at 61,318 (footnote omitted). It is clear, however, that the Commission has chosen to implement section 311(a)(2) through traditional cost-of-service ratemaking.

> "Section 311 on its face permits cost-based transportation rates by requiring the Commission to establish a method for calculating an amount necessary to compensate such pipelines for their expenses and to provide an opportunity to earn a reasonable profit. The setting of rates to recover costs and a reasonable profit is consistent with cost-based ratemaking."

Lear Petroleum Corp., 42 FERC ¶ 61,015 at 61,042 (1988) (footnote omitted);[10] *see also Producer's Gas Co.*, 35 FERC ¶ 63,040 at 65,096-98 (1986) (ALJ decision); FERC, "Interim Regulations Implementing the Natural Gas Policy Act of 1978," 43 *Fed. Reg.* 56,448 at 56,523-26 (1978) (preamble to Part 284, Subpart B regulations). References in the Conference Report on the NGPA also indicate Congress intended for FERC to rely on cost-of-service criteria to set fair and equitable rates. *See* H.R. Rep. No. 1752, 95th Cong., 2d Sess. 107-09, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9023-25 (discussing section 311(b)(2) establishing rate for sales of natural gas by intrastate pipelines); *Lear Petroleum*, 42 FERC at 61,042.

Mustang does not argue that "fair and equitable" rates should not be cost-based. To the contrary, Mustang argues that an intrastate pipeline transporting gas under Section 311 *must* recover its costs and that the Commission may not impose a rate which does not actually cover the costs of transportation service. In other words, according to Mustang, FERC may not allow an intrastate pipeline to lose money on a section 311(a)(2) transaction because, if the pipeline loses money it obviously has not been "reasonably compensated" for its expenses or given an "opportunity to earn a reasonable profit." *See* Brief of Petitioner at 27-30; Reply Brief of Petitioner at 17-18.

FERC on the other hand, emphasizes that costs and the opportunity for a profit are to be considered in rate

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[10] In *Lear Petroleum*, the Commission rejected the pipeline's argument that section 311(a) required FERC to adopt market-based, rather than cost-based, rates.

Under cost-of-service ratemaking, we are told by Mustang, "a unit transportation rate is determined by dividing the total annual (or annualized) cost of providing service (inclusive of a return on the pipeline's investment) by the annual (or annualized) volumes to be transported." Brief of Petitioner at 5 n.5; *see Producer's Gas Co.*, 35 FERC ¶ 63,042, at 65,119 (1986), Means and Cohn, Common Carriage of Natural Gas, 59 *Tulane L. Rev.* 529, 558-60 (1985).

design. That is, according to FERC, a "fair and equitable" rate is one that allows the pipeline to recover costs and make a profit when the volumes of gas considered in setting the rate materialize as the parties to the transportation agreement expect. *See Mustang Fuel Corp.*, 36 FERC ¶ 61,001 at 61,004 (1986).

The difference between the two approaches becomes particularly important when, as here, we review transportation rates retrospectively. For example, the rate which Mustang originally filed with FERC for the October 1, 1982 to September 30, 1983 rate period was based on certain projections of costs and volumes of gas to be transported.[11] Yet the actual volume transported was substantially below that anticipated, and as a result, the unit rate charged for transportation was inadequate to recover Mustang's costs.[12]

The dispute can also be characterized as a question of risk allocation. FERC's position is that the intrastate pipelines should bear the risk of the underutilization of facilities constructed for section 311(a) transportation; if the rate is initially *designed* to recover costs and allow for profit, the intrastate pipeline must bear the risk of financial losses resulting from any variance from design projections. Mustang argues that the intrastate pipeline should be protected (or, more accurately, allowed to protect itself through its contract with the interstate pipeline) from the financial risks of underutilization.

---

[11] We understand that this simplistic explanation glosses over the question of rate base allocation between El Paso and OG&E, but do not feel that this additional complexity would materially change our basic analysis—the review of FERC's statutory interpretation.

[12] Of course, the minimum bill provision was designed to protect Mustang from this possibility. *Mustang Fuel Corp.*, 31 FERC at 61,532. We consider the impact of the minimum bill provision *infra*.

FERC offered a lengthy explanation of its rationale for allocating these risks to Mustang and intrastate pipelines generally in its initial order in this case:

> "The question of who should bear the risk of underutilization must be viewed in the context of our overall approach toward implementation of section 311. Section 311 was intended to:
>
> > save interstate pipelines great expense by avoiding the need to duplicate intrastate pipeline routes in order to obtain natural gas from producing areas presently served only by intrastate pipeline systems . . . [The section] facilitates development of a national natural gas transportation network, without subjecting intrastate pipelines, already regulated by state agencies, to [FERC] regulation over the entirety of their operations. [citing H.R. Rep. No. 543, 95th Cong., 2d Sess. 45 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7712 (emphasis omitted).]
>
> In implementing section 311 consistent with this intent, the *Commission has repeatedly expressed concern that interstate customers not bear unwarranted risks as a result of an interstate pipeline making transportation arrangements with intrastate pipelines* rather than constructing its own new transportation facilities.
>
> If an interstate pipeline wishes to construct new transportation facilities, it must first obtain certification from the Commission under section 7(c) of the Natural Gas Act that such facilities are in the public convenience and necessity. . . . The Commission can put conditions (e.g., a minimum throughput requirement) on a certificate that impose the risk of underutilization on the pipeline. . . .

> However, if the interstate pipeline contracts with an intrastate pipeline which constructs new facilities to transport on behalf of the interstate pipeline under section 311, the new facilities can be constructed without Commisison review and approval. . . . Given the absence of Commission review of proposed intrastate facilities, *it is particularly important to encourage the intrastate pipeline to make a sound assessment of the need for and economic viability of the facilities.*
>
> To the extent costs of building and operating intrastate facilities are reflected in the transportation rate approved by the Commission and charged to the interstate pipeline, the interstate pipeline in turn can automatically pass through such costs to its customers. Under NGPA section 601(b)(2)(B), any amount that an interstate pipeline pays for section 311 transportation and that does not exceed the transportation component approved by the Commission is deemed just and reasonable under the Natural Gas Act and so includable in the interstate pipeline's rates. Passthrough of such transportation costs to interstate customers is thereby guaranteed.
>
> Under these circumstances, if an intrastate pipeline proposes to build a new facility solely for section 311 transportation and all costs of construction and operation of the facilities will be reflected in the section 311 transportation rate, the incentive for sound, economic assessment of the proposed facility may be reduced. . . . *Thus, in order to discourage the construction of uneconomical transportation facilities under section 311, we have required that transportation rates covering new facilities operated for section 311 transportation place the risk of underutilization on the intrastate pipeline.*"

Mustang Fuel Corp., 31 FERC at 61,530 (emphasis added, footnotes omitted); *see also Lear Petroleum*, 42

FERC at 61,051-54 ("A rate which permits the pipeline to recover the entire cost of building and operating the facility and a reasonable profit regardless of underutilization reduces the pipeline's incentive to make [a sound assessment of the need for the facilities], since the pipeline will make its profit in any event."); *cf. Columbia Gas Trans. Co. v. FERC*, 848 F.2d 250, 252-54 (D.C. Cir. 1988) (discussing allocation of risk in FERC Order No. 436).

We find FERC's rationale persuasive, particularly in light of the Commission's primary objective under the Natural Gas Act "to protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Gas Co.*, 320 U.S. 591, 610 (1943); *see Nat'l Ass'n of Regulatory Utility Comm'rs. v. FERC*, 823 F.2d 1377, 1386 (10th Cir. 1987); *see also Martin Exploration* 813 F.2d at 1062-63 (purpose of NGPA). FERC's balancing of its obligation to interstate ratepayers with the duty to intrastate pipelines under section 311(a) is a reasonable and permissible interpretation of the statutory language.[13]

---

[13] This conclusion is also supported by the Supreme Court's consideration of the comparable "just and reasonable" standard imposed on interstate pipelines by section 5(a) of the Natural Gas Act.

> "[The Supreme] Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.' *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585. No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."

Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); *see also id.* at 797; *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 306-09 (1974); *Public Service Co. of New Mexico v. FERC*, 832 F.2d 1201, 1206 (10th Cir. 1987).

Cf. Associated Gas Distributors v. FERC, 824 F.2d 981, 1003 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1468 (1988). In contrast, Mustang offers no evidence that Congress intended section 311(a)(2) to provide any sort of "hold harmless" protection for intrastate pipelines engaging in natural gas transportation or that interstate ratepayers otherwise protected under the Natural Gas Act should bear the financial risks of section 311 transportation agreements. Our reading of the statute and the legislative history indicates that Congress intended that intrastate pipelines should be able to compete in the transportation market without bearing the burden of full regulation by FERC under the Natural Gas Act. Nor do we believe that Congress intended to offer any sort of preferred status or financial guarantees to intrastate pipelines who seek authorization to transport gas under section 311(a)(2). *See id.* at 1042 ("The purpose of § 311—so far as we are able to discern—is not to bestow special benefits on any of the parties on whose behalf it authorizes transportation (*i.e.*, interstate pipelines and intrastate pipelines as well as LDCs), but to reduce the barriers between the interstate and intrastate gas markets.").

In short, FERC's interpretation of the statutory standard is reasonable and conforms to stated Congressional policies. Thus, we will defer to FERC's interpretation of the "fair and equitable" standard and to its allocation of the risks of underutilization in setting transportation rates in this case.

III.

Even though FERC's characterization of the statutory standard is correct there remains the question of whether the Commission has properly applied that standard in this case. As we noted above, the Supreme Court has adopted an extremely deferential standard of review toward agency determinations under the "just and reasonable" standard of the NGA. That same standard of re-

view should apply to the "fair and equitable" standard of section 311(a)(2).

The Supreme Court has "emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). Accordingly, when reviewing FERC's ratemaking decisions, "[a] presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'" *Id.* (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)); *see Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 806-07 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 907 (1987); *Mississippi River Trans. Corp. v. FERC*, 759 F.2d 945, 953 (D.C. Cir. 1985). Moreover, we "are not obliged to examine each detail of the Commission's decision; if the 'total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.'" *Permian Basin*, 390 U.S. at 767. *See also Mobil Oil Corp. v. FPC*, 417 U.S. 283, 307 (1974); *Cities Service Gas Co. v. FERC*, 627 F.2d 1027, 1030-31 (10th Cir. 1980). The Court did note, however, that a court reviewing a Commission order "must decide whether each of the order's essential elements is supported by substantial evidence." *Permian Basin*, 390 U.S. at 792.[14]

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[14] The standard of review outlined in *Permian Basin* and adopted for FERC ratemaking decisions here, is consistent with the NGPA, which requires that Commission findings of fact be supported by "substantial evidence," 15 U.S.C. § 3416 (a)(4), and the Administrative Procedures Act, subjecting discretionary decisions to the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see Northwest Central Pipeline Corp. v. FERC*, 797 F.2d 918, 920 (10th Cir. 1986). We choose to emphasize the Supreme Court's language here because it is more directly tailored to the question at hand.

In the context of section 311(a)(2) then, we presume that FERC's determination of a fair and equitable rate is valid, the petitioner bears the burden of showing that the approved rate is unfair and inequitable, and the elements of the order must be supported by substantial evidence. Mustang challenges two aspects of FERC's decision: the selection of actual cost data and the elimination of the minimum bill.

In the two rate filings at issue, Mustang based its projected cost of service on the actual expenses of the most recent twelve-month period "adjusted for inflation and other measurable changes," and used those figures to allocate the rate base between El Paso and OG&E. Brief of Petitioner at 14. During the course of the staff panel proceeding, the staff requested that Mustang submit actual cost of service data for the year ending September 30, 1983, and then recommended that the Commission use that data in calculating the fair and equitable rate. The Commission, finding that "Mustang never explained what specific adjustments were made and the basis for any of the adjustments," adopted the actual cost data. *Mustang Fuel Corp.*, 31 FERC at 61,528.

Mustang argues that it is inconsistent to base rates on actual costs and projected volumes[15] and that, in so

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[15] In a decision not directly challenged by Mustang, the Commission adopted Mustang's initial approach to the volume side of the rate equation, basing the unit transportation rate on the volumes projected by El Paso and OG&E for the respective rate periods. FERC rejected a staff recommendation that the unit rate be based on the volumes projected in the initial May 1, 1981 petition for rate approval. *Mustang Fuel Corp.*, 31 FERC at 61,528. According to FERC, this approach "reflecting each year the currently projected annual volumes for OG&E and El Paso spreads the risk of underutilization of new and existing facilities between Mustang and El Paso." *Id.* at 61,531. Because El Paso was using both new and existing facilities, the Commission adopted a rate methodology which *shared* some of the risk of underutilization between Mustang and El Paso.

doing, FERC has departed from the methodology that it previously approved. Mustang characterizes this action as an impermissible retroactive change in ratemaking methodology.

The Commission, on the other hand, characterizes its decision as a simple choice of data, emphasizing that, in subsequent cases, it may rely on projected cost data if Mustang adequately explains its projections. *See Mustang Fuel Corp.*, 36 FERC at 61,004 & n.8. In this case, after the initial order, Mustang attempted to explain its adjustments to the cost data through a petition for rehearing, but FERC was unpersuaded. On rehearing, the Commission once again expressed a preference for the actual cost data. "Our reason for rejecting Mustang's adjustments was that they were not adequately explained. The Statement by [Mustang] does not alleviate the concerns expressed in our order. . . . Unsupported adjustments cannot be accepted to meet Mustang's burden of proof. Actual cost data is therefore more reliable and probative." *Id.* at 61,003.

Mustang has identified no authority to support its contention that the use of actual cost data is improper. It simply asserts that the Commission dismissed its adjustments "without a foundation or adequate rationale," and that the decision unfairly shifts costs back to Mustang. While we might view the question differently than FERC, the Commission's decision is supportable. A review of FERC rate decisions reveals that the choice of data is often disputed. *See, e.g., Permian Basin*, 390 U.S. at 800-03 (affirms Commission choice of cost data); *Lear Petroleum*, 42 FERC at 61,045 ("it is preferable to rely on the most up-to-date actual data available at the time the record is closed"); *Phenix Transmission Co.*, 32 FERC ¶ 61,096 at 61,263 (1985) (conditioning section 311(a)(2) rate approval on submission of actual data after two years of operating history); *see also* Pierce, *supra* note 8 at 479 (The "zone

of reasonableness" encompasses rates based on "average costs, marginal costs, historical costs, expected future costs, individual company costs, standard costs, national costs, area costs, and a variety of noncost factors.") (footnotes omitted). Because the burden of proof in the ratemaking process rests on the pipeline, we cannot find the Commission's choice of actual cost data unreasonable. Alternatively, if we consider the selection of appropriate data as a finding of fact, we would conclude that the Commission's choice is supported by substantial evidence. *See Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1014 (10th Cir. 1985) (discussing substantial evidence standard).

Nor do we find that FERC's choice of the actual cost data is inappropriate in this proceeding. Even though the Commission accepted projected costs in Mustang's initial filing, we do not view the selection of actual cost data in the later proceeding as a change in methodology or a retroactive allocation of costs. As the Commission noted, the burden remained on Mustang to justify any rate increases. That burden includes demonstrating the validity of the data submitted to support the increase. We note further that the Commission is not bound by any particular formula or methodology in determining rates. "Provided only that they do not together produce arbitrary or unreasonable consequences, the Commission may employ any 'formula or combination of formulas' it wishes, and is free 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Permian Basin*, 390 U.S. at 800 (quoting in part *FPC v. Natural Gas Pipeline Co.*, 315 U.S. at 586).

Finally, we do not agree that the Commission has engaged in retroactive ratemaking. FERC regulations make clear that unapproved rates are collected subject to a later refund if the filed rates are determined to be in excess of that which is fair and equitable. 18 C.F.R. § 284.123(b)(2)(i); *see supra* note 1. We have approved

this procedure in connection with FERC's approval of rates under section 4 of the Natural Gas Act, and believe the same principles apply here. *See Colorado Interstate Gas*, 791 F.2d at 806-08. The decisions relied upon by Mustang are clearly inapplicable here. *See, e.g., Natural Gas Pipeline Co. v. FERC*, 590 F.2d 664, 668 (7th Cir. 1979) ("Once a rate order has become final, and no longer subject to judicial review, any change in the rate must be made prospectively." Mustang's rates were not final.).

Mustang also argues that, even if the selection of actual cost data was appropriate, FERC has "incorrectly applied its changed methodology." In the rehearing before FERC, Mustang submitted calculations showing the "proper application of the approach." Brief of Petitioner at 27. Central to Mustang's recalculations was the use of *actual* volumes rather than those projected at the beginning of the rate period.[16]

FERC rejected Mustang's revised application of the rate methodology for several reasons. *See Mustang Fuel Corp.*, 36 FERC at 61,003-04. Again, with one exception addressed below, we find FERC's rationale acceptable. At

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[16] Obviously, there is some initial appeal to Mustang's argument that it is inconsistent to match "actual" costs and "projected" volumes. After much study, we are convinced this is a classic comparison of "apples and oranges" because cost data and volume projections serve different purposes in the ratemaking equation. Normally, because rates are calculated prospectively, regulators use projected cost and volume data. Here, because FERC's review lagged behind Mustang's frequent rate filings, actual cost data was available. Use of that data is not necessarily a change in methodology, but a refinement of the data. In contrast, basing the unit rate on the actual volumes transported would be a substantive change in methodology, as it would guarantee that the intrastate pipeline would fully recover its costs and shift the risk of underutilization to the interstate pipeline and its ratepayers. For a discussion of the role of throughput projections in rate design, see *Producer's Gas Co.*, 35 FERC at 65,119-21 (ALJ decision); *Lear Petroleum Corp.*, 42 FERC at 61,051-57.

the heart of Mustang's complaint is the argument that the coupling of actual costs and projected volumes "forecloses Mustang from recovering its costs of providing service." Brief of Petitioner at 30. We have already held that section 311(a)(2) does not guarantee that intrastate pipelines will recover the costs of transportation service. There is no evidence in the record that Mustang would have been unable to recover its costs if the projected volumes had actually been transported. In other words, the rate was not unfairly *designed.* Thus, we do not find FERC's application of the methodology unfair or inequitable.

While we affirm the Commission's use of actual cost data, however, we cannot approve the selective use of that data. In its petition for rehearing, Mustang submitted actual cost data for May 1, 1983 through April 30, 1984, covering the second "locked-in" rate period. R. Vol. III at 830-32. Yet FERC continued to base the rate for this period on the actual cost data for October 1, 1982 through September 30, 1983. The order on rehearing includes no explanation of this decision. Given FERC's expressed preference for actual cost data as the "best evidence" of costs in this case, it was unreasonable to use actual cost data for a previous period when the data for the same period was in the record. FERC's failure to address this submission on rehearing forces us to conclude that the decision was arbitrary.[17] Accordingly, we

[17] While the order on rehearing discusses certain of the data submitted by Mustang, the cost data for May 1, 1983 to April 30, 1984 (Appendix B of Mustang's submittal) is not considered. We also find that Mustang's submittal of the actual cost data was timely, for Mustang was unaware that the Commission would use actual cost data until the June 4, 1985 order was issued. Thus, it is appropriate to allow Mustang to submit actual cost data for the second period on rehearing. In fact, the Commission implicitly invited this data in the June 4 order. *See Mustang Fuel Corp.*, 31 FERC at 61,535 ("Mustang can address through a petition for rehearing any recommendations by advisory staff that are adopted by the Commission.").

modify FERC's July 1, 1986 order and direct the Commission to reconsider and recalculate the rate for the second period using the actual cost data submitted by Mustang.[18]

Mustang argues most strenuously against FERC's elimination of the minimum bill provision. As previously explained, the minimum bill provision required El Paso to pay for transportation of a minimum daily quantity of gas regardless of whether that much gas was actually transported, and it insured that Mustang would recover its costs under the Transportation Agreement. FERC rejected the minimum bill "because it imposes unwarranted risk on interstate customers by defeating the allocation of underutilization risk that we adopted . . . in selecting a cost allocation and rate determination methodology." *Mustang Fuel Corp.*, 31 FERC at 61,532; *see supra* note 15; *Mustang Fuel Corp.*, 36 FERC at 61,005-07.

Mustang urges us to reinstate the minimum bill provision, arguing (1) that the minimum bill was part of the consideration for the Transportation Agreement; (2) that the minimum bill provision does not defeat the proper allocation of risk between El Paso and Mustang; (3) that elimination of the minimum bill unfairly allocates risks to Mustang; and (4) that elimination of the minimum bill is unfair and discriminatory. We fail to find these arguments persuasive.

Mustang argues that El Paso agreed to the minimum bill in exchange for transportation on a "firm basis" for

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[18] We recognize that FERC cannot increase the transportation rate above that filed by Mustang on May 23, 1983. According to Mustang's calculations, use of the cost data submitted on rehearing would result in a higher unit rate than was originally filed (38.91 cents vs. 34.30 cents). R. Vol. III at 830. Thus, assuming that these calculations are correct, the effect of our modification is to order FERC to find the filed unit rate "fair and equitable." Our modification regarding the cost data does not affect FERC's decision to eliminate the minimum bill provision, which we affirm.

its gas. The Commission noted, and the Transportation Agreement provides, that El Paso's needs for pipeline capacity are always subordinate to the needs of OG&E. "Thus," according to the Commission, "El Paso's 'protection' is of a limited nature. El Paso only gets to use Mustang's capacity up to the Daily Quantity level when OG&E does not need it. . . . [T]his is insufficient grounds to support a minimum bill." *Id.* at 61,005. We affirm FERC's reasoning and decision. Regardless of how Mustang attempts to characterize the agreement, El Paso's claims on capacity were subordinate to those of OG&E. FERC's rejection of the "consideration" argument was not unreasonable.

Mustang's argument that the minimum bill provision does not defeat FERC's allocation of risk is totally without merit. Under the minimum bill provision, if Mustang transported less than the daily quantity, El Paso paid all of the costs associated with the unused capacity. Mustang's costs were fully recovered whether the projected volumes were actually transported or not.[19] We have already held that section 311(a)(2) allows the Commission to impose the risk of underutilization on the intrastate pipeline. Mustang's argument that the minimum bill provision does not reallocate the risks to El Paso's ratepayers is unavailing.

Mustang also argues that FERC's decision unfairly shifts the risks of underutilization to Mustang because,

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[19] As FERC notes, the effect of this provision was "particularly egregious" during the October 1, 1982 through May 22, 1983 rate period because the minimum daily quantity for billing purposes exceeded the volumes projected for rate-making purposes. Thus, the minimum bill provision actually guaranteed Mustang a substantial cost over recovery. *Mustang Fuel Corp.*, 31 FERC at 61,532-33. The operation of the minimum bill provision appears "unfair and inequitable" on its face during this period. The fact that this resulted from El Paso's incorrect projections does not excuse Mustang from the burden of filing a fair and equitable rate or the Commission from ordering one.

under the Transportation Agreement, the projected volumes and the minimum daily quantity are controlled by El Paso. Mustang reasons that if El Paso overestimates the capacity needed, Mustang bears the risk of underutilization. As the Commission noted, El Paso makes the initial throughput projections, but "Mustang does not have to accept such projections without question. Absent a minimum bill provision, we believe that Mustang will seek to get as accurate an estimate from El Paso as possible, so that its proposed rate will reflect its actual costs." *Id.* at 61,006. Once again, FERC has offered a reasoned explanation for its decision.

Finally, Mustang claims that FERC's order is "unfair and discriminatory." Mustang argues that FERC's reliance on a "longstanding policy against minimum bills . . . for interruptible intrastate pipeline transportation," *id.*, is misplaced. We find no reason to review the history of FERC's minimum bill policy because its allocation of risk policy was well-established. *See Mustang Fuel Corp.*, 19 FERC at 61,318; *Mustang Fuel Corp.*, 20 FERC at 61,125; *see also Louisiana Resources Co.*, 23 FERC ¶ 61,445 at 61,986 (1983); *Louisiana Intrastate Gas Corp.*, 18 FERC ¶ 61,034 (1982). Mustang was on notice that FERC would not approve an agreement which placed all of the risks of underutilization on the interstate ratepayers. In that sense, FERC's decision is not unfair.

The order is discriminatory, according to Mustang, because FERC approved minimum bills for interstate pipelines during the same period.[20] FERC concedes that

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[20] This question was addressed in rulemaking subsequent to the initial order in this case. FERC regulations now prohibit any minimum bill provision for interruptible transportation service under section 311. *See* 18 C.F.R. § 284.9(d) (1988) ("A pipeline's rate for any transportation service provided under this section may not include any minimum bill provision, minimum take provision, or any other provision that has the effect of guaranteeing

it has allowed interstate pipelines to impose minimum bills for firm service, but distinguishes those cases from section 311(a)(2) transportation rates:

> "There is a difference, however, in the regulatory oversight we exercise over inter- and intrastate pipelines. Interstate pipelines are required to obtain a certificate of public convenience and necessity under the Natural Gas Act (NGA) before constructing facilities. The Commission can thus ensure that pipelines actually have the supply and markets to justify building such facilities and that existing customers will not be burdened with unused capacity. We do not have the same regulatory authority over intrastate pipelines. In the case of Mustang, even the state commission does not regulate its rates or approve new construction. It is thus imperative that we ensure that the risks of overbuilding and underutilization are not shifted to the interstate market."

Mustang Fuel Corp., 36 FERC at 61,006. FERC also points to prior section 311(a)(2) cases where minimum bills and standby charges have been discovered. *See Tennessee Gas Pipeline Co.*, 32 FERC ¶ 61,086 at 61,227-30 (1985); *J-W Gathering*, 23 FERC ¶ 61,007 (1983); *Transok Pipeline Co.*, 12 FERC ¶ 61,032 (1980).

FERC approval of minimum bills comparable to the one in the Mustang-El Paso Transportation Agreement is rare. Nevertheless, even if FERC has approved such rates for interstate pipelines, the differences in regulatory authority (combined with FERC's approach to allocation of the risk of underutilization) provide a reasoned basis for different treatment of intrastate pipelines

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revenue."). For a discussion of FERC's recent approach to minimum bills, see Griggs, Restructuring the Natural Gas Industry: Order No. 436 and Other Regulatory Initiatives, 7 *Energy L.J.* 71, 75-79 (1986).

under section 311(a)(2). Elimination of the minimum bill provision is neither unfair nor discriminatory.[21]

IV.

Mustang next attacks FERC's ability to require refunds and impose interest on that portion of the collected rates which has been deemed in excess of a fair and equitable rate. First, Mustang argues that section 311(a)(2) prohibits FERC from ordering refunds where the result is that Mustang is denied recovery of its costs. We already addressed this argument. Section 311 does not guarantee that costs will be recovered. Moreover, FERC regulations in effect when Mustang entered into the agreement with El Paso made it clear that section 311(a)(2) rates were subject to review and refund. 18 C.F.R. 284.123(b)(2)(i); *see supra* note 1.

Mustang also suggests that a refund order which forces it to repay revenues below its actual cost of service is confiscatory and unconstitutional. The Supreme Court has already foreclosed this argument: "[T]he just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." *Permian Basin*, 390 U.S. at 770 (citation omitted); *see also Mobil Oil Corp.*, 417 U.S. at 316 n.49. The same reasoning applies to fair and equitable rates under section 311(a)(2).

We also find that the statute generally gives FERC the authority to impose refunds. First, such authority is implicit in the direction to fashion "fair and equitable" rates. More explicitly, the NGPA gives FERC the authority to "prescribe, issue, amend, and rescind such rules

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[21] We also reject Mustang's argument that section 311 requires comparable treatment of interstate and intrastate pipelines and Mustang's undeveloped and unsupported "equal protection" claim.

and orders as it may find necessary or appropriate to carry out its functions under this chapter." 15 U.S.C. § 3411(a). Similar authority in the Natural Gas Act has been interpreted as giving the Commission broad power to fashion equitable remedies, including refunds. *See FPC v. Tennessee Gas Co.*, 371 U.S. 145, 150-53 (1962); *Consolidated Gas Trans. Corp. v. FERC*, 771 F.2d 1536, 1550-51 (D.C. Cir. 1985); *Skelly Oil Co. v. FPC*, 401 F.2d 726, 727 (10th Cir. 1968) (citing *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 40-47 (1968)); *Lear Petroleum Corp.*, 42 FERC ¶ 61,015 at 61,059 (1988).[22]

Similarly, the courts have held that interest may be charged on refunds as an appropriate "means of preventing unjust enrichment." *Skelly Oil*, 401 F.2d at 729 (quoting *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 230 (1965)). FERC regulations require that interest be assessed on these refunds, 18 C.F.R. § 284.2(b), but Mustang argues that the imposition of refunds in this case is inequitable due to the delays in the ultimate disposition of this case, citing *Estate of French v. FERC*, 603 F.2d 1158, 1168 (5th Cir. 1979). In *French* the total delay was nineteen years; the Commission took eight years to determine a just and reasonable rate and another seven years to act on a petition for special relief. *Id.* at 1167. In contrast, the delay between Mustang's initial filing and FERC's ultimate disposition on rehearing was less than four years. Furthermore, the record reveals that at least some portion of the delay was attributable to settlement negotiations between the parties. This delay is unfortunate, and we do not condone it, but it is not so extraordinary as to warrant relief from the interest requirement. *Cf Louisiana Land and Exploration Co. v. FERC*, 788 F.2d 1132, 1138-39 (5th Cir. 1986).

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[22] We also note that the Transportation Agreement between Mustang and El Paso provided that any charges in excess of a FERC-approved "fair and equitable" rate would be refunded. R. Vol. I at 254.

Finally, Mustang claims that it was denied due process of law by the Commission's procedures. Mustang fails to identify any specific statutory or constitutional requirement that the Commission's procedures violate. We have reviewed the relevant requirements of the NGPA and the APA in this regard and find no due process violation. *See Mustang Fuel Corp.*, 36 FERC at 61,007; *Mustang Fuel Corp.*, 31 FERC at 61,534-35; *Producer's Gas Co.*, 31 FERC ¶ 61,122 (1985). We are not free to impose additional procedural requirements beyond those required by the statutes and the agency. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

For the reasons explained above, Mustang's petition for review is DENIED IN PART AND GRANTED IN PART, AND REMANDED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

October 17, 1988

Before Honorable Stephen H. Anderson and Honorable Bobby R. Baldock, Circuit Judges and Honorable James A. Parker, District Judge*

No. 86-2259

MUSTANG ENERGY CORP., formerly known as MUSTANG FUEL,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

JUDGMENT

This cause came on to be heard on the record on review from the Federal Energy Regulatory Commission and was argued by counsel.

Upon consideration whereof, it is the judgment of this court that the petition for review is denied in part and granted in part. The cause is remanded to the Federal

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* Of the United States District Court for the District of New Mexico, sitting by designation.

Energy Regulatory Commission for further proceedings consistent with the court's opinion.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

A true copy

Teste

ROBERT L. HOECKER
Clerk, U.S. Court of
Appeals, Tenth Circuit

By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,265]

MUSTANG FUEL CORPORATION

Docket Nos. ST81-260-000, ST81-260-001,
ST-81-260-002, and CP82-206-000

Order Setting Fair and Equitable Rates, Ordering Refunds, and Denying Motion for Oral Argument

(Issued June 4, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

This order sets fair and equitable transportation rates for transportation service by Mustang Fuel Corporation (Mustang) for El Paso Natural Gas Company (El Paso) and orders refunds.

I. Background

Mustang, an Oklahoma intrastate pipeline, transports natural gas on behalf of El Paso using both existing and new Mustang facilities.

In 1981 Mustang added a new segment to its existing pipeline system. The segment, approximately 43 miles of 20 inch pipe, connects Mustang's system at the Cogar Compressor Station in Caddo County, Oklahoma with Producer's Gas Company's (PGC) new pipeline in Wachita County, Oklahoma. PGC's new line in turn connects with a new pipeline built by El Paso which connects to El

Paso's system at Panoma, Texas.[1] Mustang's new line was constructed under agreements by El Paso with Mustang and PGC to provide El Paso access to new gas supplies in Oklahoma.[2]

On September 30, 1981, Mustang commenced transporting gas on behalf of El Paso pursuant to section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).[3] The transported gas includes gas purchased by El Paso from Oklahoma Gas and Electric Company and certain producers. Mustang initially performed this transportation under the self-implementing authority of section 284.122(a) of the Commission's regulations, which authorizes such transportation for two years without prior Commission approval.[4] On May 1, 1981, Mustang filed a petition in Docket No. ST81-260-000 seeking approval of a 22.29 cents per Mfc transportation rate for the El Paso service. On February 17, 1982, Mustang filed an application in Docket No. CP82-206-000 seeking authority to extend the transportation on behalf of El Paso for a term of 15 years.

On May 20, 1982, the Commission authorized a 15-year transportation arrangement.[5] That order approved a settlement between Mustang and the Commission Staff (Staff) which set a 22.29 cent transportation rate, required periodic review (at least once a year) of the rate, and imposed for rate purposes an imputed annual throughput of 35,387,500 Mcf at the Cogar Compressor

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[1] *See El Paso Natural Gas Co.*, 15 FERC ¶ 61,203 (1981); *Producer's Gas Co.*, 18 FERC ¶ 61,142 (1982).

[2] 19 FERC ¶ 61,168 (1982); *See* Transportation Agreement between Mustang Fuel Corporation and El Paso Natural Gas Company, (Transportation Agreement) (filed May 1, 1981 in Docket No. ST81-260-000).

[3] 15 U.S.C. § 3371(a)(2) (1982).

[4] 18 C.F.R. § 284.122(a) (1984).

[5] 19 FERC ¶ 61,168.

Station. The May 20 order was clarified by the July 19, 1982 order on rehearing, which set an annual average daily limit of 130,000 Mcf on the transportation service and denied Mustang's request to amend the May 20 order to permit imposition of a minimum bill.[6]

On September 30, 1982, Mustang filed a petition for rate approval (Docket No. ST81-260-0001) seeking to increase its transportation rate, effective on October 1, 1982, to 32.21 cents per Mcf. The Commission then instituted a Staff Panel proceeding to determine whether the proposed rate was fair and equitable.[7] Similarly, on May 23, 1983, Mustang filed a second petition (Docket No. ST81-260-002) seeking approval of a 34.30 cents per Mcf charge, effective May 23, 1983. This increase also became effective subject to refund, pending a Staff Panel proceeding. We therefore must set rates in this proceeding for two locked-in periods, October 1, 1982-May 22, 1983 in Docket No. ST81-260-001 and May 23, 1983-April 30, 1984 in Docket No. ST81-260-002.[8]

On May 30, 1984, the Staff Panel convened to provide the participants an opportunity for oral presentation of data, views, and arguments concerning both proposed rate increases. Only the Staff and Mustang participated. Briefs were filed on June 29, 1984 and August 3, 1984. The Staff Panel certified the record of the proceeding to the Commission on August 22, 1984.

Finally, on September 7, 1984, Mustang filed a motion requesting oral argument before the Commission.

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[6] 20 FERC ¶ 61,057 (1982).

[7] 22 FERC ¶ 61,231 (1983).

[8] 25 FERC ¶ 61,094 (1983). Mustang's most recent petitions for rate approval in Docket Nos. ST81-260-003 and ST81-260-004, which increased the transportation rate effective May 1, 1984, and decreased the rate effective May 29, 1984, are outside the scope of this order. *See* 28 FERC ¶ 61,388 (1984) and 29 FERC ¶ 61,120 (1984).

II. Statutory Standard

Section 311(a)(2) of the NGPA provides that the Commission may authorize:

> any intrastate pipeline to transport natural gas on behalf of—
>
> (i) any interstate pipeline; and
>
> (ii) any local distribution company served by any interstate pipeline.
>
> 15 U.S.C. § 3371(a)(2).

Intrastate pipelines transporting under section 311(a)(2) may charge a rate that is "fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for similar transportation service." 15 U.S.C. § 3371(a)(2)(B)(i). Section 311(a)(2)(B)(ii) requires the Commission to establish a method for setting a rate to:

> (I) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, delivery, or similar service provided by such pipeline in connection with any transportation of natural gas authorized under subparagraph (A); and
>
> (II) provide an opportunity for such pipeline to earn a reasonable profit on such service.
>
> 15 U.S.C. § 3371(a)(2)(B)(ii).

III. Discussion

The participants in the Staff Panel proceeding raised several issues, which we address in turn.

A. Commission Jurisdiction Under Section 311 Over Mustang's Rates

Mustang originally claimed to be an intrastate pipeline within the meaning of NGPA section 2(16) authorized to transport gas under section 311, and the Commission so found.[9] In this proceeding, however, Mustang argued for the first time that the primary function of its system is "gathering", rather than transportation. Allegedly, Mustang's operations are therefore beyond the scope of the Commission's jurisdiction under section 311.[10]

In *Farmland Industries, Inc.*,[11] we explained the factors that we consider in determining whether a facility can be classified as a gathering system. While the ultimate test is whether the primary function of the facility is transportation or gathering, the factors considered in applying this test include: (1) the diameter and length of the facility, (2) the location of compressors and processing plants, (3) the extension of the facility beyond the central point of the field, (4) the location of wells along all or part of the facility, and (5) the geographical configuration of the system.

Applying these factors to Mustang, it is clear that gathering is not the primary function of the Mustang system. First, the system maps submitted by Mustang (Exh. JOE-1 and Exh. JOE-2) indicate that Mustang operates an extensive 2,862.35 mile system, much of which consists of relatively large diameter pipe. The system includes 7.67 miles of 26″ pipe, .63 miles of 24″ pipe, 160.12 miles of 20″ pipe, 300.38 miles of 16″ pipe, 439.99 miles of 12″ pipe, and the remainder of pipe with diameters from 2 to 10 inches. Mr. Alan Stacy, President of Mustang

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[9] 19 FERC at p. 61,317.

[10] Comments of Mustang Fuel on Application of Standards of Section 311(a)(2) of Natural Gas Policy Act and in Support of Applications for Approval of Rates at 37-38 (filed June 29, 1984).

[11] 23 FERC ¶ 61,063 (1983).

Gas Products Company and one of Mustang's witnesses, stated that Exhibit JOE-1, which diagrams mostly lines 6″ or more in diameter, "shows the major facilities and major pipelines" while Exhibit JOE-2, which is more detailed, shows "more the smaller, lateral lines, gathering lines, around the system." Tr. at 43-44. Further, the maps also show that the configuration of the system is a network interconnecting gas supplies, compressor plants, gas processing plants, and market delivery points (many of which are power plants) distributed throughout the system.[12] In short, the record demonstrates that while Mustang has some gathering lines, its system primarily transports gas from supply areas to market areas.[13]

Accordingly, Mustang's system-wide rate for El Paso is within the Commission's jurisdiction under section 311(a)(2).

B. Cost of Service and Rate Base

Mustang based its proposed 32.21 cents per Mcf rate in Docket No. ST81-260-001 and 34.30 cents per Mcf rate in Docket No. ST81-260-002 on projected, system-wide cost of service and average rate base for the twelve month periods ending September 30, 1983 and May 23, 1984 respectively. According to Mustang, each cost of service was based on actual expenses for the most current, available twelve

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[12] *See also* Tr. at 44-48; and Exh. JOE-3. To support its claim as a "gatherer", Mustang cites *J.W. Gathering Co.*, 23 FERC ¶ 61,007 (1983) (involving a system of 6.5 miles of 4.5 inch lines and 15.4 miles of 12.75 inch lines connecting wells to a treating plant and then to a pipeline) and *Seagull Energy Corp.*, 26 FERC ¶ 61,131 (1984) (involving 7 discrete systems of 2 to 10 inch lines from 2 to 20 miles long). But Mustang's system, described above, is not analogous to the systems in these cases, which the Commission found were primarily for gathering.

[13] *Compare Beacon Gasoline Co.*, 20 FERC ¶ 61,041 (1985) (where system located in supply area, consisting of short and relatively small diameter pipe, and entirely downstream from processing plant was found to be a gathering facility.)

month period, "adjusted for inflation and any known, measurable amounts to reflect the best estimate of expenses" for the rate period, and each rate base reflects actual and projected capital expenditures.[14]

Staff, on the other hand, used Mustang's actual system-wide cost of service and average rate base for the period ending September 30, 1983, the most current twelve-month period for which Mustang provided unadjusted figures. Staff accepted all of the actual amounts claimed by Mustang.[15]

While Mustang asserts that the adjustments it made to actual costs and rate base are valid, Mustang never explained what specific adjustments were made and the basis for any of the adjustments. Further, the rates involved are for locked-in periods ending May 22, 1983 and April 30, 1984, respectively, and Staff used the most recent, actual cost of service and average rate base for twelve months in the record.[16] Under these circumstances, we prefer Staff's approach of using actual figures without adjustment.

C. Cost Allocation and Rate Determination

In addition to providing section 311(a) transportation for El Paso, Mustang serves two intrastate customers, Oklahoma Gas and Electric Company (OG&E) and Public Service Company of Oklahoma, on its system. Consequently, Mustang's system-wide cost of service must be allocated between interstate (El Paso) and intrastate

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[14] Comments of Mustang at 16; Tr. at 56.

[15] Tr. at 74. *See* Initial Submission of Staff, Appendix A (filed June 29, 1984); and Exh. MEA-5.

[16] While there is an actual cost of service and average rate base for the six months ending March 31, 1984 (Exh. MEA-9), there is no basis for treating these amounts as representative of a full twelve-month period upon which a unit rate can be based.

(OG&E)[17] service and a unit cost per Mcf calculated in order to establish the rate for El Paso.

1. Mustang's and Staff's Positions

Mustang proposed to allocate costs between OG&E and El Paso and calculate a unit cost for each period based upon the transportation volumes currently projected by OG&E and El Paso for the respective period. This approach spreads the risk of underutilization of Mustang's facilities between Mustang and El Paso. In contrast, Staff allocated Mustang's costs and calculated a unit cost based upon the OG&E and El Paso volumes projected in Mustang's initial May 1, 1981 petition for rate approval under section 311(a)(2). Staff's approach imposes much less of the risk of underutilization on El Paso and its customers.

Using the following procedure, Mustang allocated costs for two twelve-month periods, one ending September 30, 1983 (for the proposed 32.21 cent rate) and a second ending May 23, 1984 (for the proposed 34.30 cent rate). First, with respect to rate base items,[18] Mustang directly assigned to OG&E or El Paso items related to facilities that are used exclusively by each customer. The remaining, unassigned rate base (about 78% of total adjusted rate base) was allocated between OG&E and El Paso based upon the transportation volumes that each projected for the twelve-month period. Further, after adding El Paso's allocated portion of rate base to the items directly assigned to El Paso, Mustang calculated the ratio of the El Paso portion of rate base to total rate base and

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[17] For purposes of allocating costs, Mustang and Staff attributed to OG&E all rate base items and cost of service associated with service provided to both OG&E and Public Service Company of Oklahoma.

[18] These items include Plant in Service, Accumulated Reserves for Depreciation, Cash Working Capital, Prepayments, Materials and Supplies, and Reserve for Deferred Income Taxes.

used the ratio to prorate all cost-of-service items. Considering both assigned and unassigned rate base, Mustang allocated to El Paso 29.22 percent of the rate base and, thus, of the cost of service for the September 30, 1983 period and 21.56 percent for the May 23, 1984 period.[19] Finally, to calculate the unit cost per Mcf, Mustang divided the cost of service allocated to El Paso (except costs associated with Cogar Compressor Station) by the volumes projected by El Paso for the period. Thus, Mustang's cost allocations for the September 30, 1983 and May 23, 1984 periods are based on projected volumes for El Paso and OG&E totalling 174 Bcf (34 Bcf for El Paso alone) and 155 Bcf (21.1 Bcf. for El Paso alone) respectively.[20]

Staff applied a similar procedure but used the volumes which were originally projected in Mustang's May 1, 1981 petition for rate approval. Mustang's initial 22.29 cent rate was based on these projections, covering the period July 1, 1981-June 30, 1982.[21] Instead of allocating unassigned rate base (about 80% of total actual rate base) using the current projections of transportation volumes for the rate periods, Staff used the volumes originally projected for July 1981-June 1982, totalling 176.4 Bcf (33.3 for El Paso alone). As a result, Staff, using actual costs for the twelve months ending September 30, 1983, allocated 26.68 percent of the total rate base and the cost of service to El Paso and the rest to OG&E.[22]

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[19] Exh. C, Statement of Martin E. Adler at 2-3; and Exh. MEA-1 and Exh. MEA-3.

[20] Exh. MEA-1 at 3 and Exh. MEA-3 at 3. Both Mustang and Staff calculated separately the unit costs for Cogar Compressor Station based on the 35,387,500 Mcf throughput established in the settlement in Docket No. ST81-260-000, *et al.*

[21] Mustang's Petition for Approval of Rates and Charges for Transportation, Exh. C, Schedule No. 1 (filed May 1, 1981 in Docket No. ST81-260-000).

[22] Initial Submission of Staff, Appendix A (filed June 29, 1984).

Staff then calculated the unit rate by dividing the cost of service allocated to El Paso (except Cogar Compressor Station costs) by El Paso's originally projected volume of 33.3 Bcf, rather than the El Paso's currently projected volumes. Staff thereby derived a 28.8 cents per Mcf rate for both the periods.

In short, Mustang and Staff used the same basic procedure to allocate costs and determine the rate. They also agreed that costs associated with the Cogar Compressor Station should be divided by the imputed throughput of 35.39 Bcf to derive that portion of the rate. They disagreed over what volumes should be used in determining the remainder of the system-wide transportation rate for El Paso.

2. Analysis

Under our long-standing policy, interstate customers should not bear unwarranted risk of overbuilding by intrastate pipelines. In evaluating Staff's and Mustang's alternative approaches in light of our policy, we consider that in performing section 311 transportation Mustang uses both existing and new facilities that also serve its intrastate customers. We conclude below that, under these circumstances, Mustang's approach should be adopted.

The major part of the Mustang facilities used for section 311 transportation was constructed before Mustang entered into the Transportation Agreement with El Paso. These existing facilities were built to serve OG&E. They still primarily serve OG&E but are not fully utilized. Some of the excess capacity is now used to transport El Paso's gas to the new Mustang facilities that connect with the PGC system.

Under its Transportation Agreement with El Paso, Mustang constructed certain new facilities. First, Mustang built a new line linking the existing Mustang system to the PGC system. The line is used both to transport

El Paso's gas to PGC and to transport gas from connecting laterals for OG&E. Second, Mustang built the Cogar Compressor Station whose initial purpose was to increase the pressure of El Paso's gas entering PGC's line.[23] Third, certain gathering lines were built to carry El Paso owned gas to the Mustang system.

Under Mustang's approach to calculating a system-wide rate covering both new and existing Mustang facilities, the risk of underutilization is shared between El Paso and Mustang (and its intrastate customers). If OG&E and/or El Paso project lower transportation volumes over a rate period, the rates charged both to OG&E and El Paso for the period can increase. This is because both El Paso's rate and the unit cost allocated to Mustang's intrastate market will reflect the reduced volumes through (i) the allocation of costs based on their respective proportions of Mustang's total transportation volumes and (ii) their respective transportation volumes over which their allocated costs are spread. Take, for example, a period where both OG&E and El Paso project lower volumes but El Paso projects a greater than proportionate reduction. El Paso's rate can increase because its allocated share of costs, although reduced by its smaller proportion of total volumes, is spread over its reduced volumes.[24] At the same time, the unit cost allocated to Mustang's intrastate market can also rise to cover its increased allocation of costs and the reduction in the intrastate volumes over which such costs are spread. Similarly, a greater than proportionate reduction in OG&E's

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[23] Tr. at 48.

[24] While Mustang's proposed 34.30 cent rate, effective May 23, 1983, reflected a higher total cost of service than Mustang's initial 22.29 cent rate, the rate increase is attributable in part to the more than proportionate decline in El Paso's volumes. *Compare* Exh. MEA-3 at 1 and Mustang's Petition for Approval of Rates, Exh. C, Schedule No. 1.

projected volumes for a rate period can increase El Paso's rate as well as the unit cost for the intrastate market.[25]

In contrast to Mustang's proposal, Staff's approach imposes much more of the risk of underutilization of facilities on intrastate customers. Staff bases its proposed system-wide rate on the volumes projected in Mustang's May 1, 1981 petition for rate approval around the time Mustang's new facilities were constructed. Regardless of changes in the current projections, El Paso's rate continues to reflect El Paso's original proportion of total volumes and of the cost of service and to spread the allocated costs over its originally projected volumes. El Paso is insulated from any increased costs attributable to reduced throughput projections after 1981. Staff thereby imposes on Mustang and its intrastate customers all of the risk that El Paso and/or OG&E will use less capacity than projected for the first year that Mustang performed section 311 transportation.

The question of who should bear the risk of underutilization must be viewed in the context of our overall approach toward implementation of section 311. Section 311 was intended to:

> *save interstate pipelines great expense* by avoiding the need to duplicate intrastate pipeline routes in order to obtain natural gas from producing areas presently served only by intrastate pipeline systems . . . [The section] facilitates development of a national natural gas transportation network, without subjecting intrastate pipelines, already regulated by state agencies, to [FERC] regulation over the entirety of their operations.[26]

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[25] Mustang's proposed rate increase to 32.21 cents, effective October 1, 1982, reflects in part the more than proportionate decline in OG&E's volumes for the period. *Compare* Exh. MEA-1 at 3 and Mustang's Petition for Approval of Rates, Exh. C, Schedule No. 4.

[26] H.R. Rep. No. 95-543, 95th Cong., 2nd Sess. 45 (1977), *reprinted in* (1978) U.S. Code Cong. & Admin. News at 7712.

In implementing section 311 consistent with this intent, the Commission has repeatedly expressed concern that interstate customers not bear unwarranted risks as a result of an interstate pipeline making transportation arrangements with intrastate pipelines rather than constructing its own new transportation facilities.[27]

If an interstate pipeline wishes to construct new transportation facilities, it must first obtain certification from the Commission under section 7(c) of the Natural Gas Act[28] that such facilities are in the public convenience and necessity. The Commission considers, among other things, the amount of gas available for transportation, the proposed capacity of the facilities, and the availability of alternative transportation facilities. The Commission can put conditions (e.g., a minimum throughput requirement) on a certificate that impose the risk of underutilization on the pipeline.[29] Interstate customers can intervene to participate in the Commission's certification review.

However, if the interstate pipeline contracts with an intrastate pipeline which constructs new facilities to transport on behalf of the interstate pipeline under section 311, the new facilities can be constructed without Commission review and approval. Facilities used solely for section 311 transportation are not subject to Commission certification jurisdiction.[30] Given the absence of Commis-

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[27] *See Louisiana Interstate Gas Corp.*, 18 FERC ¶ 61,034, at p. 61,050 (1982); *Producers' Gas*, 18 FERC at p. 61,292; and *Red River Pipeline Co.*, 18 FERC ¶ 61,149, at p. 61,310 (1982) (in all three cases the Commission limited the terms of settlement rates to prevent imposition of "unwarranted" risk on interstate customers).

[28] 15 U.S.C. § 717f(c) (1982).

[29] *Tennessee Gas Pipeline Co., a Division of Tenneco Inc. v. F.E.R.C.*, 689 F.2d 212, 216 (D.C. Cir. 1982).

[30] 18 C.F.R. § 284.3(c). In the instant case the intrastate pipeline, Mustang, is a private carrier and also is not subject to state regulation. Tr. at 18.

sion review of proposed intrastate facilities, it is particularly important to encourage the intrastate pipeline to make a sound assessment of the need for and economic viability of the facilities.

To the extent costs of building and operating intrastate facilities are reflected in the transportation rate approved by the Commission and charged to the interstate pipeline, the interstate pipeline in turn can automatically pass through such costs to its customers. Under NGPA section 601(b)(2)(B), any amount that an interstate pipeline pays for section 311 transportation and that does not exceed the transportation component approved by the Commission is deemed just and reasonable under the Natural Gas Act and so includable in the interstate pipeline's rates. Passthrough of such transportation costs to interstate customers is thereby guaranteed.[31]

Under these circumstances, if an intrastate pipeline proposes to build a new facility solely for section 311 transportation and all costs of construction and operation of the facility will be reflected in the section 311 transportation rate, the incentive for sound, economic assessment of the proposed facility may be reduced. Full recovery of costs (including costs attributable to underutilization of the facilities) through the transportation rate guarantees the intrastate pipeline recovery of its costs, including return on equity, regardless of whether the new facility is underutilized. Similarly, the interstate pipeline will automatically pass through, and thereby recover, its costs from interstate customers. Yet these customers had no opportunity to participate in a Commission review of the construction decision. Thus, in order to discourage the construction of uneconomical

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[31] This contrasts with the passthrough, under NGPA section 601(c)(2), of amounts paid with respect to the purchase of gas. Passthrough of these amounts are guaranteed except if they are excessive due to fraud, abuse, or similar grounds. *See Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,334, at pp. 61,710-61,711 (1984).

transportation facilities under section 311, we have required that transportation rates covering new facilities operated for section 311 transportation place the risk of underutilization on the intrastate pipeline.[32]

In setting rates to properly allocate underutilization risk, our concerns differ with regard to existing vs. new facilities. Mustang's existing facilities were planned and built solely for intrastate service, and at the time of construction, all risk of underutilization was borne by Mustang and/or its intrastate customer. Mustang's evaluation of the economic viability of the facilities and its decision to construct could not have been distorted by any assumption that costs resulting from overbuilding could be passed through to interstate customers. Consequently, we need not be concerned that a sharing by interstate and intrastate customers of underutilization risk relative to existing facilities will encourage construction of uneconomic facilities for section 311 transportation.

Further, permitting interstate customers to bear a portion of the costs of underutilization of existing intrastate facilities will encourage the use of such facilities for section 311 transportation. By transporting for an interstate pipeline, an intrastate pipeline is able to spread the costs of underutilization of its existing system over a larger number of volumes and thereby reduce the

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[32] *Louisiana Resources Co. and Faustina Pipe Line Co.*, 23 FERC ¶ 61,445, p. 61,986 (1983) (approving one-part commodity rate with stipulated throughput so as to "guarantee" interstate customers do not bear risk of underutilization).

But see Black Warrior Pipeline, Inc. and Rayar Pipeline, Inc., 8 FERC ¶ 61,241 (1979) (where in its first case applying the "fair and equitable" standard under section 311, the Commission approved a demand charge to recover the cost of new facilities). The Commission has not followed *Black Warrior* and has instead approved one-part rates, sometimes with stipulated throughputs. *See Producers' Gas*, 18 FERC at p. 61,292; and *Red River*, 18 FERC at p. 61,310.

burden on its intrastate market. Under these circumstances, sharing underutilization costs will facilitate the integration of intrastate and interstate facilities. This is consistent with Congressional intent [33] that section 311 promote savings by interstate pipelines by facilitating the creation of a national gas transportation system.

Applying this policy to the instant case, we conclude that Mustang's approach to cost allocation and rate determination is preferable to Staff's. Here we are setting a transportation rate that covers new and existing facilities that serve both section 311 and intrastate customers. Although Mustang constructed some new facilities used for section 311 transportation, the new facilities are a relatively small extension of Mustang's existing system and, to a great extent, are used in conjunction with the rest of the system to serve both El Paso and intrastate customers. Reflecting this joint use of Mustang's system, both Mustang and Staff rolled in the new facilities except the Cogar Compressor Station and, in calculating El Paso's rate, allocated to intrastate service over 70 percent of Mustang's system-wide cost of service.

As discussed above, Mustang's approach, reflecting each year the currently projected annual volumes for OG&E and El Paso, spreads the risk of underutilization of new and existing facilities between Mustang and El Paso. Because Mustang and its intrastate customers are served by, and will bear a significant portion of any costs from underutilization of, Mustang's new facilities, Mustang's approach does not remove Mustang's economic incentive to avoid overbuilding transportation facilities. There is not the potential distortion of investment decisions that would result if El Paso's interstate customers had to bear all or most of the costs of underutilization. At the same time, by sharing between Mustang and El Paso the costs attributable to Mustang's existing facilities, Mustang's

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[33] (1978) U.S. Code Cong. & Admin. News at 7712.

approach provides some incentive for Mustang to continue to perform section 311 transportation.

In contrast, Staff's approach unnecessarily shifts most of the risk of underutilization of new and existing facilities to Mustang and its intrastate customers. Under Staff's approach, all of the risk of a decline in transportation volumes below the levels projected in 1981 are imposed on Mustang. El Paso's rate is calculated on the assumption that Mustang will transport the OG&E and El Paso volumes projected in Mustang's May 1, 1981 petition for rate approval. Mustang and its intrastate customers must bear any increased costs attributable to reduced throughput.

Because Mustang's approach accomplishes in this case both the objective of encouraging construction of only economically viable, section 311 facilities and of encouraging use of existing intrastate facilities for section 311 transportation, we prefer that approach over Staff's proposal. In choosing Mustang's approach, we stress that we are not holding that this is the only appropriate method to be used for setting rates under section 311.

3. Determination of Mustang's Rates

We have found that Mustang's approach should be applied in this case but that Mustang's transportation rates should be based on the actual cost of service and average rate base for the period ending September 30, 1983, rather than the adjusted costs and rate base proposed by Mustang. Appendices A and B of this order contain our derivation of the rates based on these findings. We conclude that the resulting rates, 28.93 cents and 33.75 cents per Mcf, are fair and equitable for the periods ending May 22, 1983 and April 30, 1984 respectively.

4. Approach in Future Mustang Rate Proceedings

In approving the use of Mustang's approach in this proceeding, we note our concern over the treatment of the

Cogar Compressor Station and direct the participants in Mustang's next section 311 rate proceeding to address this concern. In the instant proceeding both Mustang and Staff directly allocated to El Paso the portion of Mustang's rate base that is attributable to the Cogar Compressor Station and, in calculating the unit cost of transporting for El Paso, applied the 35.39 Bcf throughput established by the May 20, 1982 settlement in Docket No. ST81-260-000, *et al.* This separate treatment of the Cogar Compressor Station reflects Mustang's claim that these compressors were constructed in order to deliver El Paso's gas at pipeline pressure into PGC's pipeline system and do not directly benefit OG&E.[34]

Since the construction of the Cogar Compressor Station and the 43 mile line connecting Mustang's system to PGC's system, Mustang has added laterals and other facilities to the 43 mile line.[35] According to Mustang, it "quite recently" began purchasing gas from OG&E along that line.[36] This gas is sometimes used to supply El Paso, displacing El Paso's gas that is located on other parts of Mustang's system and that otherwise would be transported to El Paso through the Cogar Compressor Station. Depending on El Paso's needs at any given time, the flow in the 43 line may be reversed to bring OG&E's gas back to OG&E's electric generating facilities.[37]

Because these recent changes in Mustang's facilities and operations may have altered the function of the Cogar Compressor Station, we are concerned that it may no longer be appropriate to treat the station as solely benefitting El Paso. We therefore direct the participants in Mustang's next section 311 rate proceeding to address

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[34] 19 FERC at p. 61,319; *see also* Tr. at 48.

[35] *See* Exh. JOE-1.

[36] Tr. at 48.

[37] *Id.* at 49, 54, and 86-87.

whether the Cogar Compressor Station provides system-wide benefit and, along with the 43 mile line, should be allocated between El Paso and Mustang's intrastate customers. The participants should also consider whether, under such circumstances, the separate throughput condition for the Cogar Compressor Station should be continued.

For similar reasons, we are concerned that the gathering lines treated by Mustang in this case as solely benefitting either El Paso or OG&E may now provide system-wide benefit. The participants should address whether the cost of these gathering lines should continue to be directly allocated, for ratemaking purposes, to either El Paso or OG&E.

D. Monthly Minimum Bill

Under its Transportation Agreement with El Paso, Mustang provides transportation service to El Paso on a "firm basis" subject to Mustang's obligations to OG&E. Article IV of the Transportation Agreement establishes a monthly minimum bill. Under the minimum bill Mustang charges El Paso each month for transportation of a minimum daily quantity (130,000 Mcf through May 22, 1983 and 58,000 Mcf through April 30, 1984) whether or not such volumes are actually transported and delivered to El Paso. The minimum daily quantity, which equals "at a minimum" the aggregate minimum quantity that El Paso is required to take or pay for under its purchase contracts with OG&E and certain producers, is subject to annual review and redetermination by mutual agreement.

1. Docket Nos. ST81-260-001 and ST81-260-002

Mustang included the minimum bill provision in its proposed rates of 32.21 cents per Mcf and 34.30 cents per Mcf in Docket Nos. ST81-260-001 and ST81-260-002 respectively. The stated rate was applied to the minimum daily quantity rather than to the actual volumes that

Mustang transported for El Paso. At the hearing before the Staff Panel, Mustang proposed to modify the minimum bill, effective January 1, 1984, to provide El Paso "make-up" rights. Within three years of El Paso making a minimum bill payment, Mustang would transport, at no additional charge, any undelivered volumes for which El Paso paid the transportation rate, provided that El Paso first would take its minimum daily quantity. According to Mustang, the minimum bill provision, as modified, is fair and equitable. Allegedly, the minimum bill covers fixed costs (and only minimal variable costs) and reflects its obligation under the Transportation Agreement to build and maintain sufficient capacity to provide El Paso with "firm" service.

We reject the proposed minimum bill because it imposes unwarranted risk on interstate customers by defeating the allocation of underutilization risk that we adopted above in selecting a cost allocation and rate determination methodology. In establishing the methodology for setting Mustang's rate, we concluded that the risk of underutilization of Mustang's facilities should be shared between Mustang and El Paso. This sharing of underultilization risk provides Mustang some incentive to perform section 311 transportation but to avoid overbuilding section 311 facilities.

However, the minimum bill requires El Paso to pay for transportation of a minimum daily quantity through Mustang's system regardless of whether such quantity is transported. To the extent Mustang transports for El Paso less than the minimum daily quantity, El Paso pays *all* costs associated with the unused transportation capacity, i.e., the capacity represented by the difference between the minimum daily quantity and the amount actually transported. Thus, the underutilization risk that we held should be borne by Mustang is shifted back to El Paso.

The effect of the minimum bill is particularly egregious during the October 1, 1982—May 22, 1983 rate period when the minimum daily quantity would be 130,000 Mcf. The minimum bill requires El Paso to pay the transportation rate for 47.5 Bcf per year (130,000 Mcf per day times 365 days). However, the 28.93 cents per Mcf rate for the period is based on annual El Paso volumes of only 35.39 Bcf for Cogar Compressor Station and 34.02 Bcf for the rest of Mustang's system. Under these circumstances, Mustang is guaranteed revenues which more than cover the cost of service adopted for the rate period and so yield a higher return on equity than that allowed in the cost of service.

The impact of the minimum bill is mitigated somewhat during the May 23, 1983-April 30, 1984 rate period. Mustang and El Paso mutually agreed to reduce the minimum daily quantity to 58,000 Mcf per day or 21.17 Bcf per year. The 33.75 cents per Mcf rate for this period is based on annual El Paso volumes of 21.13 Bcf (except for the Cogar Compressor Station). With a minimum daily quantity about equal to projected volumes, the minimum bill shifts back to El Paso much of the risk of underutilization. El Paso bears all additional costs of unused capacity in Mustang's facilities once El Paso's volumes fall below the projected level.

In light of our policy that interstate customers should not bear unwarranted risk of underutilization of intrastate facilities, we hold that the minimum bill provision proposed by Mustang is not fair and equitable. The fact that Mustang provides "firm" service to El Paso does not alter the rationale, discussed above, for the allocation of underutilization risk that we have adopted. Similarly, Mustang's offer to provide El Paso limited make-up rights does not change our analysis. An unfair and inequitable allocation of underutilization costs results if El Paso is unable to meet the conditions for exercising make-up rights. Consistent with prior cases where we have re-

jected minimum bills under section 311,[38] we will remove the minimum bill from Mustang's proposed rates, effective October 1, 1982 and May 23, 1983, and order refund of minimum bill payments under these rates for undelivered volumes.

2. Docket Nos. ST81-260-000 and CP82-260-000

During the Staff Panel's consideration of Mustang's proposed minimum bill, it has become clear that Mustang also applied the minimum bill provision during September 30, 1981 through September 30, 1982, the period covered by the settlement we approved in Docket No. ST81-260-000, *et al.* As discussed below, such application of the minimum bill is not only contrary to Commission policy but also is not authorized by the settlement. We therefore will order refunds for this rate period.

Mustang's initial petition for rate approval, filed May 1, 1981 in Docket No. ST81-260-000, included the minimum bill provision in Article IV of the Transportation Agreement. Settlement discussions resulted in an offer of settlement by Mustang, which filed an amended transportation agreement on February 17, 1982. The transmittal letter describing the settlement offer did not mention the minimum bill provision or otherwise impose the

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[38] *See* J.W. Gathering, 23 FERC at pp. 61,021-61,022 (where the Commission found that a proposed charge under section 311 based on a "Minimum Monthly Quantity" shifts the risk of facility underutilization to interstate customers and so is contrary to the public interest); and Louisiana Resources, 23 FERC at p. 61,986 (approval of settlement under section 311(a)(2) because of elimination of minimum bill provision obligating interstate pipeline to "ship-or-pay" for a minimum amount of gas).

To the extent Mustang cites non-section 311 cases and rulemakings concerning the use of minimum bills by *interstate* pipeline, its reliance is misplaced. As discussed above, in contrast to interstate pipelines, we do not have plenary rate and facility jurisdiction over intrastate pipelines. For this reason, we have not permitted the risk of underutilization of intrastate facilities to be shifted to interstate customers through minimum bills.

risk of underutilization on interstate customers. On the contrary, Mustang agreed to protect interstate customers from bearing the risk of underutilization of the Cogar Compressor Station by calculating the unit cost of compression at the station based on an imputed throughput of 35.39 Bcf. However, the amended transportation agreement continued to include the minimum bill provision from the initial rate filing. Mustang simply amended Article IV to change all references to the minimum purchase amount from "Contract Demand" to "Daily Quantity." The May 20, 1982 order approved the settlement and a 22.29 cent per Mcf transportation rate but did not mention the minimum bill provision.

El Paso and Mustang sought rehearing of the May 20, 1982 order. Mustang's request for rehearing contained specific proposed amendments to the May 20 order. In particular, Mustang sought to revise Ordering Paragraph (C) of the order to read:

> (C) Mustang is authorized to charge a fair and equitable rate of *22.29* cents per Mcf *computed and adjusted in accordance with Article IV of* [*the transportation*] *agreement with El Paso*, subject to Paragraphs (D) and (E) herein. (emphasis added).[39]

The July 19, 1982 order rehearing rejected the inclusion on the above-underlined phrase, noting:

> Finally, Mustang objects to Ordering Paragraph (C) which found its proposed *22.29* cents rate to be "fair and equitable." Mustang believes that this rate should reflect the adjustment specified in Article IV of the Transportation Agreement. We do not believe that Article IV substantively alters the level of the *22.29* cents rate and therefore would not believe that a modification of the order is necessary. The effect of this rate is for El Paso to pay *22.29* cents for

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[39] Application of Mustang Fuel Corporation for Rehearing and Clarification and Modification of Order at 11 (filed June 18, 1982).

> *each Mcf of gas actually delivered* and represents a commodity rate rather than a demand charge. 20 FERC at p. 61,125 (1982) (emphasis added).

The statement in the July 19, 1982 order on rehearing that Article IV has no substantive effect on the rate was incomplete because the minimum bill would affect the quantity of gas to which the rate is applied and so would affect the total amount paid by El Paso. However, the order clearly required that the rate be applied only to the quantity actually delivered.

In short, Mustang sought specific approval of an adjustment to the *22.29* cent rate to include a minimum bill that would permit Mustang to charge El Paso for undelivered volumes, but the Commission expressly denied this adjustment. Mustang did not seek rehearing of the rejection of the minimum bill provision.

Despite our rejection of the minimum bill in Docket No. ST81-260-000, *et al.*, Mustang collected the minimum bill during September 30, 1981 through September 30, 1982 under the settlement. Such collection is not authorized by either the May 20, 1982 order or the July 19, 1982 order on rehearing. Since we have also found above that Mustang's proposed continuation of the minimum bill during October 1, 1982 through April 30, 1984 is not fair and equitable, we will order refunds of Mustang's minimum bill collections for undelivered volumes beginning September 30, 1981 through April 30, 1984.[40]

E. Comparability to Interstate Pipelines

In addition to determining a fair and equitable transportation for Mustang's service of El Paso, the Commis-

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[40] Under section 2.5 of El Paso's Stipulation and Agreement in Docket No. RP82-23-000, *et al.* (approved in *El Paso Natural Gas Co.*, 23 FERC ¶ 61,365 (1983)), El Paso will credit its Account No. 191 with such refunds and reduce its base rates to reflect these reductions.

sion must also find that the rate does not exceed an amount that is reasonably comparable to the rates which interstate pipelines would be permitted to charge for similar transportation service.

Staff proposed to compare its proposed 28.8 cents per Mcf rate with rates for transportation and gathering charged by Mountain Fuel Supply Company (19.67 cents and 33.7 cents),[41] Panhandle Eastern Pipe Line Company (37 cents),[42] and Colorado Interstate Gas Company (46.08 cents).[43] In response, Mustang argued that the Commission has never applied this prong of the rate standard.[44]

We hold that the rates we have found to be fair and equitable (i.e., 28.93 cents per Mcf in Docket No. ST81-260-001 and 33.75 cents per Mcf in Docket No. ST81-260-002) do not exceed amounts reasonably comparable to rates that interstate pipelines would charge for similar service. The short answer to Mustang's position on the comparability test is that NGPA section 311(a)(2) mandates application of this test in setting a transportation rate. Further, there is no evidence in the record that the rates we have adopted exceed what an interstate pipeline would charge for similar service. On the contrary, these rates fall well within the range of interstate rates in the record. We conclude that the rates adopted in Docket Nos. ST81-260-001 and ST81-260-002 satisfy the comparability test.

IV. Mustang's Motion for Oral Argument

On September 7, 1984, Mustang filed a motion requesting oral argument before the Commission in addition to the opportunity for oral argument already provided be-

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[41] *Mountain Fuel Supply Co.*, 25 FERC ¶ 61,276 (1983).

[42] *Panhandle Eastern Pipe Line Co.*, 27 FERC ¶ 61,233 (1983).

[43] *Colorado Intrastate Gas Co.*, 22 FERC ¶ 61,330 (1982).

[44] Comments of Mustang at 73-74.

fore the Staff Panel. Both counsel for Mustang and Staff made oral and written presentations to the Staff Panel. Mustang asserts that the opportunity for presentations before the Staff Panel proceeding is not sufficient and does "not comport with either due process or fairness to an applicant in a contested rate proceeding." [45]

In support of its motion Mustang cites section 502 of the NGPA. Section 502(a) provides that the Administrative Procedure Act [46] applies to any rule or order issued under the NGPA having the applicability and effect of a rule. NGPA section 502(b) states:

> To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a). 15 U.S.C. § 3412(b).

According to Mustang, an order setting rates for an individual company is a rule and so the Commission must permit oral presentations before issuing the instant order.

While it appears that the instant order is a rule governed by informal rulemaking procedures under section 4 of the APA,[47] Mustang has already been provided an opportunity for oral presentation. In this case, the Commission ordered oral presentations to be made before the Staff Panel. Mustang fails to explain why the presentations must be before the Commission itself in order to satisfy due process and NGPA requirements.

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[45] Motion of Mustang for Oral Argument at 6 (filed September 7, 1984).

[46] 5 U.S.C. § 551 *et seq.* (1982).

[47] *See Phillips Petroleum Co. v. F.P.C.*, 475 F.2d 842, 851-852 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1973) (holding that rate determinations under section 4 of the Natural Gas Act are rules governed by the informal rulemaking procedures under the APA).

Mustang also claims that it is unfair for "Staff" to both (i) appear, represented by counsel, before the Staff Panel and (ii) preside as the panel and subsequently make recommendations to the Commission. Further, although Mustang had a full opportunity to respond to the opposing positions taken by staff counsel before the Staff Panel, Mustang claims that its "right" to reply to recommendations of the panel to the Commission has been denied. Allegedly, this would be cured by permitting oral argument before the Commission.

We reject Mustang's equating of (i) Staff counsel and technical personnel who took an adversary role in this proceeding (and their immediate supervisors for this case) and (ii) the Staff Panel which acted as an advisor to the Commission. Mustang ignores the fact that the same Commission employees did not function in these two roles.

It is hardly unusual for Commission employees to participate, some as litigators and some as advisors, in a given case. On the contrary, this occurs in virtually every section 4 rate proceeding under the Natural Gas Act.[48] This practice is reflected in Rule 2202 of the Commission's regulations. Rule 2202, which applies to adjudicatory-type proceedings such as section 4 rate cases, requires separation of litigation and advisory functions in such cases.[49] This rule does not apply to nonevidentiary proceedings such as the instant Staff Panel proceeding.[50]

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[48] 15 U.S.C. § 717c

[49] 18 C.F.R. § 385.2202 ("In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof in that or any factually related proceeding, shall participate or advise, as to the findings, conclusion or decision, except as a witness or counsel in public proceedings").

[50] We also note that separation of functions is not required by due process, the NGPA, or the Administrative Procedure Act in

However, because some legal and technical staff participated as a party in the proceeding, a separation of functions was maintained as a matter of administrative discretion.

Finally, Mustang provides no legal basis for asserting a right under due process to respond to recommendations by advisory staff (e.g., the Staff Panel) to the Commission, particularly since the APA requires no such right to respond in an informal rulemaking.[51] We also note that Mustang can address through a petition for rehearing any recommendations by advisory staff that are adopted by the Commission.

In summary, Mustang already had an opportunity for oral presentation and to respond to opposing positions taken by Staff counsel and fails to show any statutory or other infirmity with procedures used in this case.[52] Because, in addition, the record (including Mustang's presentation) provides a sufficient basis for resolution of the issues in this proceeding, we deny Mustang's motion for further oral argument.

The Commission finds:

(1) For the periods October 1, 1982—May 22, 1983 and May 23, 1983—April 30, 1984 respectively, transportation rates of 28.93 cents and 33.75 cents per Mcf (with-

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rulemaking proceedings. *See United Steelworkers of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1214-1215 (D.C. Cir. 1981), *cert. denied*, 453 U.S. 913 (1981); *American Telephone & Telegraph Co. v. FCC*, 449 F.2d 439, 455 (2d Cir. 1971); *Wilson & Co. v. U.S.*, 335 F.2d 788, 797 (7th Cir. 1964).

[51] 5 U.S.C. § 553; *see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1977) (holding that due process requirements generally do not exceed minimum APA requirements).

[52] *See Producer's Gas Company*, Docket No. ST83-429-002, *et al.* (May 1, 1985), 31 FERC ¶ 61,122, (holding Staff Panel procedures are consistent with due process).

out any minimum bill or adjustment under Article IV of the Transportation Agreement, as amended) are fair and equitable and do not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(2) Mustang was not authorized in Docket No. ST81-260-000, *et al.*, to adjust the approved *22.29* cents per Mcf rate or to otherwise impose a minimum bill.

The Commission orders:

(A) Mustang shall charge transportation rates of 28.93 cents and 33.75 cents per Mcf for the periods covered by Docket Nos. ST81-260-001 and ST81-260-002 respectively. These rates shall not be adjusted under Article IV of the Transportation Agreement, as amended.

(B) Within 45 days of the issuance of this order, Mustang shall refund the following amounts, plus interest: (i) all amounts collected in excess of the approved rates during October 1, 1982—April 30, 1984 and (ii) all amounts collected from September 30, 1981 through April 30, 1984 for volumes not actually transported on behalf of El Paso. Within 10 days thereafter, Mustang shall file a refund report showing the amounts of refunds and interest paid.

(C) Within 60 days of the issuance of this order, El Paso shall file a refund report indicating the rate adjustments required by section 2.5 of its March 15, 1983 Stipulation and Agreement.

(D) All refunds calculated under Ordering Paragraphs (B) and (C) shall include interest at an amount determined in accordance with 18 C.F.R. § 154.102(c) and § 284.2(b).

(E) Mustang's motion for oral argument is denied.

APPENDIX C

FEDERAL ENERGY REGULATORY COMMISSION

[¶ 61,001]

MUSTANG FUEL CORPORATION

Docket Nos. ST81-260-006, ST81-260-007, CP82-206-003 and CP82-206-004

Order Rejecting Settlement, Granting in Part and Denying in Part Rehearing and Ordering Refunds

(Issued July 1, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

I. Procedural History

On July 3, 1985, Mustang Fuel Corporation (Mustang) filed for rehearing of the Commission's order issued in these proceedings on June 4, 1985.[1] That order established fair and equitable rates for transportation of natural gas by Mustang on behalf of El Paso Natural Gas Company (El Paso) pursuant to section 311(a) of the Natural Gas Policy Act (NGPA) and ordered refunds of amounts collected in excess of such rates.

Subsequently, on April 11, 1986, Mustang filed an offer of settlement. Oklahoma Gas and Electric Company filed comments in support of the settlement proposal.

Three separate periods are at issue in these proceedings. The first period, hereinafter called Period I; extends from September 30, 1981 through September 30, 1982, and is covered by a Commission approved settlement in Docket Nos. ST81-260-000 and CP82-206-000. The transportation rate approved by the Commission for

[1] 31 FERC ¶ 61,265 (1985).

that period is 22.29 cents per Mcf.[2] The second period, to be called Period II, runs from October 1, 1982 through May 22, 1983. Mustang's filing for that period in Docket No. ST81-260-001 requested a rate increase to 32.21 cents per Mcf. The third period, hereinafter Period III, runs from May 23, 1983, when Mustang filed for a further petition seeking approval of a 34.30 cents per Mcf rate, to April 30, 1984. That petition was filed in Docket No. ST81-260-002.

A Staff Panel was convened on May 30, 1984, to provide participants an opportunity for oral presentation of data, views, and arguments concerning the rate increases in the latter two dockets. Briefs were filed by Mustang and the Commission staff (staff). On September 7, 1984, Mustang filed a motion requesting oral argument before the Commission.

II. Background

Mustang commenced transportation on behalf of El Paso on September 30, 1981, under the self-implementing authority of section 284.122(a) of the Commission's regulations, which authorizes such transportation for two years without prior Commission approval.[3] The gas transported is purchased by El Paso from Oklahoma Gas and Electric Company (OG&E), Mustang's major intrastate transportation customer, as well as certain producers.

A 1981 Transportation Agreement between Mustang and El Paso required Mustang to construct a new seg-

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[2] *FERC Statutes and Regulations, Regulations Preambles 1982-85* ¶ 30,644.

[3] 18 C.F.R. § 284.122(a) (1985). Section 284.122(a) has been amended by the rulemaking issued October 18, 1985, in Docket No. RM85-1-000, 50 Fed. Reg. 42,495-42,496 [*FERC Statutes and Regulations, Regulations Preambles 1982-85* ¶ 30,665]. However, the changes do not affect the substantive issues in this case.

ment of line, approximately 43 miles in length, connecting Mustang's existing system at the Cogar Compressor Station in Caddo County, Oklahoma, with Producer's Gas Company's (PGC) new pipeline in Wachita County, Oklahoma. The existing facilities were built to serve OG&E but were not fully utilized. The Cogar Compressor Station was built to increase the pressure of El Paso's gas as it entered PGC's line. PGC's new line in turn connects to a new pipeline constructed by El Paso to join El Paso's existing system at Panome, Texas, thereby providing El Paso access to new gas supplies in Oklahoma.

June 4, 1985 Commission order

In our order of June 4, 1985, we ruled on three main issues: the proper method of determining Mustang's costs and rates; the fairness and equitableness of Mustang's minimum bill in Periods II and III; and the Commission's intent in earlier orders respecting Mustang's minimum bill for Period I.

With respect to Mustang's costs and rates, we basically adopted the methodology proposed by Mustang, with one exception. First, we approved the rolling-in of new and old facility costs—except those associated with the Cogar Compression Station—because of the joint use of Mustang's system by both El Paso and Mustang's two intrastate customers, OG&E and Public Service Company of Oklahoma. The Cogar Compression Station costs were allocated separately to El Paso. Our reason for rolling-in these costs was the fact that the new facilities constructed by Mustang to serve El Paso are a relatively small extension of Mustang's existing system and, to a great extent, are used in conjunction with the rest of the system to serve both inter- and intrastate customers. We thus concluded that the new facilities do not result in unwarranted costs being borne by interstate customers.

Next, we adopted Mustang's procedure for allocating the rolled-in costs between inter- and intrastate customers

for Periods II and III, with the one exception noted above. Mustang's procedure was as follows. First, it directly assigned to OG&E or El Paso certain rate base items used extensively by each customer. The remaining unassigned rate base items were allocated between OG&E and El Paso based upon the transportation volumes that each projected for each of the two rate periods. After adding the directly assigned rate base items to the portion of the remaining rate base assigned to El Paso, Mustang calculated the ratio of El Paso's portion of rate base to total rate base and used that ratio to prorate all cost-of-service items.

Where we parted company with Mustang was in choosing the appropriate rate base and cost-of-service. For each of the two dockets, Mustang used its projected, system-wide cost-of-service and average rate base for the twelve-month periods ending September 30, 1983 and May 23, 1984, respectively. Staff applied the same basic method but, for both periods, used Mustang's actual system-wide cost-of-service and average rate base for the period ending September 30, 1983, the most current twelve-month period for which Mustang provided unadjusted figures. Staff accepted all actual amounts claimed by Mustang. In our order of June 4, 1985, we adopted Staff's position with respect to use of actual cost-of-service and average rate base because Mustang did not adequately explain its adjustments.

Finally, to calculate the unit cost per Mcf, Mustang divided the cost-of-service allocated to El Paso (except costs associated with the Cogar Compressor Station) by the volumes projected by El Paso for each of the periods in question. Staff had proposed to use the transportation volumes originally projected for El Paso in Mustang's May 1, 1981 petition for rate approval. The settlement rate approved in Docket No. ST81-260-000, *et al.*, was based on those volumes. However, we adopted Mustang's

projected volumes for each rate period to derive the unit cost per Mcf.

Based on the above-described methodology, we found that the fair and equitable rates for the transportation service provided to El Paso for the two locked-in periods were 28.93 cents and 33.75 cents, respectively.

With respect to the second issue, the Commission rejected the minimum bill found in Article IV of the Transportation Agreement because it imposes unwarranted risks on interstate customers by defeating the allocation of risk adopted by the Commission in selecting a cost allocation and rate determination methodology. The Commission found the effect of the minimum bill to be particularly egregious during Period II when the minimum bill would require El Paso to pay the transportation rate for 47.5 Bcf. The Commission's 28.93 cents per Mcf rate is based on annual volumes of only 35.39 Bcf for the Cogar Compressor Station and 34.02 Bcf for the rest of Mustang's system. The June 4, 1985 order directed Mustang to refund payments made for undelivered volumes.

As to the third issue, the Commission found that application of the minimum bill during Period I was not authorized by the settlement and was specifically disallowed by the Commission's order of May 20, 1982 and July 19, 1982.[4] Refunds for minimum bill payments made in excess of charges for actual deliveries were also ordered.

The Commission also denied Mustang's motion for oral argument on the grounds that it failed to explain why oral presentation must be before the Commission itself in order to satisfy due process and NGPA requirements. Finally, the Commission rejected Mustang's argument that due process was violated because members of our Staff appeared as counsel before the Staff Panel and on

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[4] 20 FERC ¶ 61,057 (1982).

the Staff Panel. No individual served in a dual capacity. Moreover, the proceedings do not require a separation of functions. The separation of functions rule found in Rule 220 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.220) does not apply to non-evidentiary proceedings such as the instant Staff Panel proceeding.

III. Discussion of Mustang's Rehearing Request

Mustang's petition for rehearing specifies numerous errors as grounds for relief. We will address Mustang's arguments as they relate to to specific findings in the Commission's order.

A. Method Of Determining Costs And Rates

Mustang argues on rehearing that the use of actual cost data with projected volumes is inconsistent, unfairly shifts costs retroactively to OG&E and, as a methodology for future rate cases, guarantees delays so that actual costs for a past period can be obtained. Mustang argues that neither the staff panel nor staff counsel requested additional data to explain the adjustment made by Mustang in arriving at its projected costs. Mustang therefore attaches as Appendix A to its request for rehearing the statement of Martin E. Adler, Assistant Treasurer for Mustang, explaining the adjustments made to its cost-of-service. We note this appendix has been submitted after the close of record date of the staff panel.

Mustang's arguments do not address the basic problem we had with Mustang's data. Our reason for rejecting Mustang's adjustments was that they were not adequately explained. The Statement by Martin E. Adler also does not alleviate the concerns expressed in our order of June 4, 1985. It simply reiterates that operating and administrative expenses were subjected to an inflation factor but does not state the source or basis for such inflation factor. Projected increases in overhead costs are attrib-

uted to an increasing number of employees but no figures are provided. Unsupported adjustments cannot be accepted to meet Mustang's burden of proof. Actual cost data is therefore more reliable and probative. It is true that Mustang was not asked to explain its adjustments by the Staff Panel but, as explained in our June 4, 1985 order, the Panel proceeding is not designed as an adjudicatory forum. There is no cross-examination of witnesses. It simply gives the pipeline and other parties an opportunity to present their data, views, and arguments in support of their respective positions. We then weigh the evidence and base our decision on the data presented. Mustang had the burden of proof regarding its asserted adjustments to the actual costs and, quite simply, failed to support them. We therefore deny rehearing of our June 4, 1985 order, on the issue of using actual, versus adjusted, cost-of-service and rate base figures.

On rehearing, Mustang also presents for the first time a number of appendices allegedly setting forth the "correct" application of the method which Mustang seems to think we intended to adopt but did not quite know how to apply. That method, according to Mustang, would use projected volumes for each period to allocate actual costs for each period between OG&E and El Paso. Then actual throughput in each period would be divided into the costs allocated to El Paso under this method to determine the unit rate. Appendices C, D and E to Mustang's Request for Rehearing set forth the cost-of-service allocated to El Paso under this method, with the corresponding rate per Mcf, for each of the three rate periods in question, assuming no minimum bill payments for volumes not received.

Alternatively, Mustang argues that if the Commission disallows the minimum bill and does not correct its application of the method it allegedly adopted, then the Commission is under a statutory and constitutional obligation to allow Mustang to retain its actual costs for service

to El Paso during the same three periods. Mustang therefore attaches three more appendices (Appendices F, G and H) showing Mustang's actual costs and the actual throughput volumes for each period in question. These appendices, like Appendices A, C, D, and E, have been submitted after the close of record date of the staff panel. While it is not clear from Mustang's explanation, we assume that, in Appendices F, G, and H, the allocation of costs between El Paso and OG&E was done on the basis of actual, as opposed to projected, throughput. We will call Mustang's first method (using our presumed method) Alternative A and Mustang's second option Alternative B. The chart in Appendix A to this rehearing order provides a short-hand summary of the different costs of service and rates devised by Mustang and the cost-of-service and rates used by the Commission.

According to Mustang, the result of using Alternative A would be that Mustang would make refunds for Period II of $3,735,144 but no refunds in Period III because it would have had a revenue deficiency of $236,901. If the Commission refuses to "correct" the methodology allegedly adopted in the June 4, 1985 order, then Mustang argues that it must be allowed to retain at a minimum its actual cost of serving El Paso in each period as set forth in Alternative B.

There are, however, numerous problems with the alternative methodologies proposed by Mustang. Its appendices are essentially factual in nature and should have been submitted to the Staff Panel before the close of record date. They were not, and the Commission need not consider them. However, even if they were timely submitted, we find they are deficient. First, Mustang assumes that we intended, not only to remove the minimum bill for Period I, but also to revisit the issues of cost allocation, cost-of-service and rate determination for that period. This was not our intention. The settlement is

binding on Mustang and on the Commission[5] and, given our disposition of the settlement minimum bill issue, *infra*, we need not address any further Mustang's plethora of rate calculations for Period I.

The second error in Mustang's appendices is that they do not take into consideration Mustang's agreement to use an assumed throughput volume for the Cogar Compressor Station. Instead, Alternatives A and B use actual throughput to allocate the total cost-of-service and derive El Paso's rate. Mustang cannot pick and choose the elements of a rate determination that will most favor it. The minimum throughput was part of the settlement package accepted by the Commission and, until Mustang stops allocating those costs separately[6] to El Paso, it must continue to use those volumes in deriving El Paso's unit rate.

Third, while Mustang's appendices would not result in a revenue increase for each period, they would result in a *rate* increase for each period. This is in violation of a cardinal rule of ratemaking, the rule against retroactive rate increases.[7] We do not interpret section 311(a)(2)(B)(ii) of the NGPA as authorizing the Commission to order reparations to make up for revenues unrecovered as a result of a defective rate design. Under that section, the Commission need only: (a) establish a method for

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[5] *Texas Gas Transmission Corp. v. F.P.C.*, 441 F.2d 1392 (6th Cir. 1971).

[6] In the order of June 4, 1985, we expressed our concern about cost allocation procedure used for the Cogar Compressor Station and directed the participants in Mustang's next section 311 proceeding to address whether that facility now provides system-wide benefits and should, therefore, be allocated between El Paso and Mustang's intrastate customers.

[7] The rule against retroactive ratemaking is applied in a variety of settings and is not limited to ratemaking under the Natural Gas Act. *See Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (involving telephone rates), *Payne v. Washington Metropolitan Area Transit Comm'n*, 415 F.2d 901 (D.C. Cir. 1976) (involving bus fares).

calculating an amount necessary to "reasonably" compensate the intrastate pipeline for its cost of providing the transportation sevice, and (b) provide "an opportunity" for such pipeline to earn a reasonable profit on such service.

Fourth, Mustang's Appendices F and G assume that Mustang is entitled to a guaranteed, minimum return on rate base when it is statutorily entitled only to an *opportunity* to earn a reasonable profit on its services. *See* Section 311(a)(2)(B)(ii)(II).

The fifth defect in Mustang's arguments is that they assume a mismatching in our June 4, 1985 order of projected volumes for a future period with actual costs from a past period. Mustang assumes this to be a change in methodology from that used in the ST81-260-000 settlement and postulates that we now propose to let cases "languish" until actual costs can be obtained for locked-in periods. Mustang is mistaken. We did not, *at this juncture*, intend any change in methodology. Rather, we used the best available evidence in the record. Since Mustang did not substantiate the adjustments it made to its projected costs, it was necessary to use actual costs.[8]

In conclusion, we find that Appendices C through H of Mustang's petition are fatally flawed and cannot be used as the basis for deriving Mustang's section 311 rates.

B. Minimum Bill

1. Minimum Bill for Period I

In our order of June 4, 1985, we stated that Mustang's use of a minimum bill during Period I was contrary to

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[8] This does not mean we are bound to use projected volumes with a projected cost-of-service in all future proceedings simply because we accepted the use of this methodology in Docket No. ST81-260-000. Settlements have no precedential value. 18 C.F.R. § 602(c)(1)(iv). *See also*, Ordering Paragraph (G) of our May 20, 1982 order, 19 FERC at p. 61,319.

Commission policy and not authorized by the settlement. We therefore ordered refunds of any amounts collected for undelivered volumes during that period.

On rehearing, Mustang argues that the Commission's action was erroneous because: (1) the minimum bill was justified on the merits, and (2) such action is based upon an erroneous interpretation of the settlement and the orders issued May 20, 1982, and July 19, 1982. For the policy reasons set forth, *infra*, regarding the allocation of risk, we deny Mustang's rehearing on the first ground. However, a reexamination of the settlement agreement and the Commission's orders leads us to grant rehearing on the second ground. We therefore vacate our refund order as it pertains to the minimum bill issue for Period I.

The first document that we reexamined was the Transportation Agreement entered into by Mustang and El Paso. A plain reading of paragraph (A) (1) of Article IV of the Transportation Agreement filed on May 1, 1981, and incorporated by reference in Mustang's February 17, 1982 settlement offer confirms Mustang's argument that El Paso was required to pay for a minimum monthly amount, regardless of actual deliveries, and that the volume level used to compute the monthly billing was subject to annual renegotiation. Neither the cover letter nor the application for approval of the February 17, 1982 settlement agreement specify that a minimum bill is contemplated. Nor is the word "minimum bill" used anywhere in the Transportation Agreement. Mustang therefore took pains not to draw attention to the fact that its proposed rate of 22.29 cents per Mcf was not to be billed per Mcf delivered but, rather, to be multiplied by a monthly minimum volume. Nonetheless, the fact remains that the Transportation Agreement requires El Paso to pay on a monthly basis the following amount:

> An amount computed by multiplying El Paso's Contract Demand in Mcfd by a unit amount equal to: *22.29* cents per Mcfd,[9] times 365/12, rounded to the nearest one-tenth of a cent.

Next, we reexamined our order of May 20, 1982,[10] titled Order Granting Transportation Authorization. That order finds the proposed settlement reasonable and therefore accepts and approves it. While the order speaks in terms of a 22.29 cents per Mcf rate without reference to the mechanics of Article IV, it does not specifically propose any modification of Mustang's minimum bill provision. However, the order contains a number of ambiguities, which were pointed out by Mustang in its Application For Rehearing And Clarification And Modification, filed June 18, 1982.

In the July 19, 1982 Order On Rehearing, the Commission specifically amended the previous order to grant several of the requested modifications but denied Mustang's requested modifications on two issues, one of which concerned Article IV. Unfortunately, rather than clarifying matters, the Commission's Order On Rehearing appears to have compounded the confusion. With respect to Mustang's request for a modification of Ordering Paragraph (C) to include a reference to the provisions of Article IV, the Commission states:

> We do not believe that Article IV substantively alters the level of the 22.29 cent rate and therefore would not believe that a modification of the order is necessary. The effect of this rate is for El Paso

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[9] The original Transportation Agreement, dated January 9, 1981, and appended as Exhibit A to Mustang's May 1, 1981 Petition for Approval of Rates and Charges in Docket No. ST81-260-000, uses a figure of 19.35 cents per Mcfd. However, the Agreement specifically contemplates that a revised unit rate will be used based on Mustang's actual anticipated cost-of-service.

[10] *FERC Statutes and Regulations, Regulations Preambles 1982-85* ¶ 30,644.

> to pay 22.29 cents for each Mcf of gas actually delivered and represents a commodity rate rather than a demand charge.

As we stated in our order of June 4, 1985, the first sentence of the above-quoted statement is incomplete. While Article IV does not affect the rate charged per Mcf, it has considerable impact on the level of the monthly bill paid by El Paso.

The second sentence is also incomplete. If the reference to "this rate" is to the rate set forth in Article IV, the discussion obviously reflects a misunderstanding of the workings of Article IV, since El Paso is obligated thereunder to pay 22.29 cents not only for each Mcf actually delivered, but also 22.29 cents for volumes *not* delivered, up to 130,000 Mcf per day. If the reference is to the rate as set forth in Ordering Paragraph (C) of the May 20, 1982 order, the assumption is that Ordering Paragraph (C) modified the settlement. Yet the order of May 20, 1982, does not specifically so state. Did the rehearing order of July 19, 1982, by implication, modify the settlement? On reconsideration, we believe not.

The decisive factor leading us to this conclusion is that in neither the May 20, 1982 order nor the July 19, 1982 order did we order refunds of amounts collected for volumes not actually transported. This, despite the fact that Mustang had commenced deliveries to El Paso under the self-implementing authorization of section 284.122(a) on September 30, 1981, some eight months before our first order finding fair and equitable rates, and had thus been collecting minimum bill rates since that date. The order Instituting Rate Proceedings issued September 28, 1981, specifically tracks the language of section 284.123 (b)(2)(ii) when it states that the Commission "will either approve the transportation rate proceeding or disapprove the rate and order refund[s], with interest, of any amount which has been determined to have been

collected in excess of that permitted by the statutory standard." [11] The word "will" is mandatory, not precatory, and does not appear to make refunds discretionary where a rate is disapproved. Since no such refund order was made, we conclude that the language from the July 19, 1982 order quoted above did not modify the rate set forth in Article IV and that the July 19, 1982 order did not eliminate the minimum bill for Period I. We therefore modify Ordering Paragraph (B) of the June 4, 1985 order to rescind Mustang's refund obligation as it relates to Period I.

2. Minimum Bill for Periods II and III

Mustang requests rehearing of our removal of its minimum bill from its rates for Periods II and III. Mustang states that removal of the minimum bill is unwarranted for four reasons. Those reasons will be considered *seriatim.*

(1) *Consideration*

Mustang argues that the minimum bill was part of the consideration it received for entering into the Transportation Agreement with El Paso and for agreeing to commit its system to "first call" by El Paso. Mustang argues that a primary purpose of the minimum bill was to afford El Paso protection in the form of "firm" transportation equal to the volume of its take-or-pay commitment with producers.

Mustang admits, however, that its commitment of capacity to El Paso is subordinate to its commitment to its intrastate customer OG&E. Thus, El Paso's "protection" is of a limited nature. El Paso only gets to use Mustang's capacity up to the Daily Quantity level when OG&E does not need it. It is true that under Article IV El Paso would not pay for the difference between its shipments and the minimum level, if that difference were

[11] 16 FERC ¶ 61,242, at p. 61,519 (1981).

due to Mustang's inability to transport those volumes. But that would also be the case without a minimum bill. El Paso therefore derives little benefit from this commitment of capacity. We conclude, therefore, that this is insufficient grounds to support a minimum bill.

(2) *Risk*

Mustang's second argument is that removal of the minimum bill shifts all risks to Mustang and leaves none on El Paso, even though El Paso controls the Daily Quantity to be used in calculating the minimum bill. Mustang points out that it makes no sales to El Paso and therefore must accept El Paso's projections of throughput. El Paso could therefore project a throughput of 20,000,000 Mcf, make no use of the system whatsoever, and leave Mustang to absorb its operating costs, states the transporter.

We think Mustang underestimates its own business acumen. While El Paso may well have the initiative in making throughput projections, Mustang does not have to accept such projections without question. Absent a minimum bill provision, we believe that Mustang will seek to get as accurate an estimate from El Paso as possible, so that its proposed rate will reflect its actual costs. Furthermore, Mustang has the protection afforded by our review of its rates. If El Paso's actual call on Mustang's system has fallen short of its projections, resulting in an undercollection of costs, Mustang can file to increase its rates. Our orders of May 20, 1982 and July 19, 1982 require Mustang to file *at least* once a year but do not prohibit it from filing more frequently.

As stated in our order of June 4, 1985, the risk of underutilization of Mustang's facilities must be apportioned fairly between Mustang and the interstate customers of El Paso. A minimum bill imposes unwarranted risks on El Paso and removes any incentive Mustang would have to ensure that additional facility investments will be fully utilized.

(3) *Practical Operation*

Mustang's third argument is that the Commission incorrectly assumes that the operation of the minimum bill always results in the kind of discrepancy between actual and projected throughput that occurred in Period II, during which time El Paso elected not to reduce the Daily Quantity. Mustang asserts that the period of October 1, 1982 through May 22, 1983, is abnormal. Any overrecoveries were due to El Paso's refusal to change its Daily Quantity for over a year and its inadequate attention to actual throughput in relation to its forecasts.

This argument does not persuade us. The fact remains that El Paso *did* overestimate its use of Mustang's system and could do so again. The costs of such miscalculations would not be borne by El Paso's stockholders, as Mustang appears to assume, but by El Paso's ratepayers. Under section 601(b)(2) of the NGPA, any amount paid by El Paso for transportation authorized under section 311(a) is deemed just and reasonable if such amount does not exceed that approved by the Commission. Thus, the Commission could not require El Paso's stockholders to absorb any minimum bill charges incurred by El Paso if the minimum bill is approved by us. The Commission has an obligation to protect interstate customers from unwarranted risks. Mustang is better able to protect itself in arms-length negotiations with El Paso than are consumers who have no say in what estimates El Paso uses.

(a) *Discrimination*

Finally, Mustang alleges that the Commission's action is inequitable and provides for disparate treatment of inter- and intrastate pipelines. Mustang points out that Order No. 380,[12] prohibiting interstate pipelines from collecting gas costs for volumes not actually received by their customers was not promulgated until after the pe-

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[12] *FERC Statutes and Regulations, Regulations Preambles* ¶ 30,571 (1984).

riod at issue in this case. Moreover, states Mustang, Order No. 380 declined to take action regarding transportation minimum bills.

There is a difference, however, in the regulatory oversight we exercise over inter- and intrastate pipelines. Interstate pipelines are required to obtain a certificate of public convenience and necessity under the Natural Gas Act (NGA) before constructing facilities. The Commission can thus ensure that pipelines actually have the supply and markets to justify building such facilities and that existing customers will not be burdened with unused capacity. We do not have the same regulatory authority over intrastate pipelines. In the case of Mustang, even the state commission does not regulate its rates or approve new construction. It is thus imperative that we ensure that the risks of overbuilding and underutilization are not shifted to the interstate market.

In addition, the Commission has recently issued its transportation rulemaking which specifically addressed transportation minimum bills. Under the new blanket certificates issued under Subpart G of Part 284 of the Commission's Regulations, reservation fees are not permitted for Section 311 interruptible transportation by either inter- or intrastate pipelines. *See* 18 C.F.R. § 284.9 (d).

The Commission's determination in the June 4, 1985 order is, moreover, consistent with its long-standing policy against minimum bills or standby reservation charges for interruptible intrastate pipeline transportation. *See Transok Pipeline Company*, Docket No. ST79-8, 12 FERC ¶ 61,032 (1980); *Panhandle Eastern Pipe Line Company*, Docket No. RP82-59, *Trunkline Gas Company*, Docket No. RP82-60-000, 19 FERC ¶ 61,084 (1982). Mustang's arguments that it is being subjected to disparate treatment must therefore be dismissed.

Conclusion

Finally, a minimum bill such as that found in Article IV of the Transportation Agreement discourages the most efficient use of resources. El Paso may be tempted to forego a cheaper gas supply in favor of transporting volumes through Mustang's system because of the incremental cost of the minimum bill. This is clearly not in the public interest. For all of the above reasons, we deny rehearing on the minimum bill issue as it relates to Periods II and III.

C. Due Process

Mustang challenges the Commission's finding that the procedures adopted in this case satisfy statutory and constitutional requirements for due process of law. Mustang contrasts procedures used in a section 311 case with the process involved in a contested rate proceeding under section 4 of the NGA. The company states that, while it does not dispute the Commission's view of what is required by section 502 of the NGPA and the Administrative Procedure Act (APA), there are times when the courts have imposed extra-statutory procedural requirements where an agency has disregarded minimal principles of procedural fairness. According to Mustang, this is such a case.

Mustang has not raised any arguments that were not already addressed in our previous order. It simply reiterates that by not treating this case as an adjudicatory proceeding, we have violated a separation of functions rule. Yet Mustang does not object to with our statement that our order of June 4, 1985, is a rule governed by the informal rulemaking procedures of section 4 of the APA.[13] Neither due process nor the APA requires a separation of litigation and advisory functions in a rulemaking.[14] Even so, no members of the Commission's staff acted in a dual

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[13] 5 U.S.C. § 551, *et seq.* (1982).

[14] *American Telephone & Telegraph Co. v. FCC*, 499 F.2d 439 (2nd Cir. 1971).

capacity in this case. Although Mustang was not permitted to cross-examine staff on its position, it was accorded an opportunity to ask questions through the Staff Panel.

Mustang argues that permitting it to petition for rehearing does not give it a right to respond to the internal recommendations of the Staff Panel, unless the Commission "corrects the substantive errors that flow from the procedural defects to date . . ." and accepts its adjustments.[15] This is akin to arguing that a procedure is fair only if one wins. The fact is, Mustang has had an opportunity to respond to opposing views before the Staff Panel, and to those of the Commission in a request for rehearing. This is an advisory rulemaking proceeding throughout and the right to respond to the internal recommendations of staff to the Commission is not a matter of right. Due process, in general, and section 502(a) of the NGPA, in particular, do not give such an extraordinary right. Moreover, though we are not required to consider evidence presented after the record is closed, we acceded to Mustang's request to consider the materials in the appendix attached to its rehearing petition on their merits. We have weighed the arguments and additional data presented by Mustang—as well as the lack thereof—and have granted rehearing or modified our prior order where Mustang has presented convincing arguments in favor of its position. Where we were not presented with convincing arguments and data, we rejected its arguments and denied rehearing. Having examined Mustang's proferred evidence in support of its proposed adjustments to actual data, we conclude that Mustang has still not met its burden of explaining and justifying its adjustments. Due process requires no more on our part at this juncture.

Mustang's allegation that the Commission has turned a prescription of rates for the future into an adjudication

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[15] Request of Mustang Fuel Corp. for Rehearing at 51, fn. 16.

of past charges does not merit serious consideration. Mustang's rates became effective, subject to refund, the day it filed its rate changes. Even if the Commission had issued an order within a month, there would still have been a "past period" involved. The only reason the rates determined to be fair and equitable in this proceeding will not have any future effect is because Mustang filed another rate change on May 1, 1984. The propriety of those rates is being determined in another proceeding.[16] Those rates are not the subject of this proceeding.

D. Refunds

Mustang argues that refunds are not required because the Commission's order is invalid. For the reasons set forth above respecting Mustang's specifications of error, we reject this argument. Next, Mustang asserts that the amount of refunds ordered by the Commission is unlawful because it is based on an incorrect application of the Commission's methodology. Mustang's contention is predicated on the incorrect assumption that the Commission intended, as a matter of principle, to adopt a methodology involving actual costs and projected volumes. (*See* discussion *supra* of Appendices C, D, and E to the Request for Rehearing.) It also incorrectly assumes that for Period I, we intended to revise the rate agreed upon by settlement.

However, even if Mustang were correct (it is not) and we did indeed intend to use projected volumes for allocation and actual costs and volumes for deriving the unit rate for all three periods, Mustang still overrecovered $3,735,144 during Periods II and III.[17] By Mustang's own admission then, it has overrecovered its actual costs. Refunds are thus clearly required.

Mustang requests that, if refunds of any amounts are ordered, the Commission rescind the requirement for im-

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[16] *See* 28 FERC ¶ 61,388 (1984) and 29 FERC ¶ 61,120 (1984).

[17] Request for Rehearing at 56.

mediate cash refunds and, in lieu thereof, permit Mustang to pay back such amounts with billing adjustments for El Paso over the period from September 1, 1985 through August 31, 1989. Mustang states that it is advised that this alternative method is not opposed by El Paso.

Section 284.2 of the Commission's regulations [18] does not specify a particular refund procedure, leaving the choice of appropriate methodology to the Commission on a case by case basis. In a recent decision in *Mississippi Fuel Company*, Docket No. ST80-298-005, *et al.*,[19] the Commission considered the issue of whether to permit refunds to be disbursed through installments paid over a 12-month period instead of by a lump-sum payment. In *Mississippi Fuel Company*, we noted that, in the typical section 311 case, we would opt for a lump-sum payment of refund amounts but found special circumstances in that case which warranted a departure from this general rule. Those circumstances included a refund period dating back to 1982 and a refund amount that exceeded the intrastate pipeline's claimed return allowance during any of the annual rate periods at issue.

Similar circumstances appear to be present in this case also. First, the refund at issue covers amounts collected during two rate periods dating back to October 1, 1982. Second, the amount of the refund is likely to be substantial. Mustang claims that the aggregate of refunds and interest ordered in our June 4, 1985 order far exceeds annual collections from El Paso, particularly at current throughput volumes, and exceeds Mustang's net income for all of its services to all its customers. A lump-sum refund, even of a lesser amount, would thus create a hardship for Mustang. However, as in *Mississippi Fuel Company*, we do not believe a crediting arrangement is appropriate. Crediting requires a customer to use the

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[18] 18 C.F.R. § 284.2.

[19] 32 FERC ¶ 61,496 (1985).

facilities in order to receive any benefit from the "refund." We will therefore permit Mustang to refund the amounts collected in excess of the fair and equitable rate through equal monthly installments beginning 45 days from the date of issuance of this order. However, we believe the four year period requested by Mustang is excessive, notwithstanding that El Paso's customers are protected by receiving interest on unpaid balances until the refund obligation is fully discharged. Spreading the refund over such a long period almost guarantees that the customers who will be buying gas from El Paso in 1989 will not be the same customers who bought the gas transported by Mustang in 1982. Furthermore, since Mustang does not now have to refund monies collected under the minimum bill during Period I, the refund burden is substantially lessened. We will therefore shorten the refund period to two years, beginning 45 days from the date of issuance of this order.[20]

E. Interest

Mustang argues that we are precluded from ordering interest because of the delay involved in deciding this case. We do not accept Mustang's characterization of the thirty-one month delay between Mustang's rate filing on September 30, 1982, and our order of June 4, 1985, as all the fault of this Commission and its staff.[21] In between those two dates, extensive settlement negotiations took place and, when they proved unsuccessful, a Staff Panel was convened. Following the Staff Panel, both Mustang and the staff made written submissions, the last of which was filed August 3, 1984. Given the novel nature of this proceeding and the wealth of issues that needed to be addressed, a ten-month delay issuing an order setting fair and equitable rates is not unreasonable.

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[20] By notice issued July 17, 1985, the Secretary of the Commission extended the due date for Mustang's refunds under the June 4, 1985 order until 15 days after a final order on rehearing. Our order today provides for a 45-day period.

[21] Request for Rehearing at 58.

Mustang's allegation that staff deliberately delayed proceedings to obtain actual cost data is totally spurious and with no basis in fact. Mustang's attachment to the settlement methodology is understandable but the Commission's refusal to approve such method in successive rate cases does not amount to a violation of the fundamental notions of equity, as the company implies. Interest is within the Commission's discretion to order and where, as here, a company has manifestly overcharged for a section 311 service and obtained—interest free—the use of a customer's money for over three years, a repayment with interest is clearly warranted. Mustang's request for rehearing on this issue is denied.

IV. Discussion of Mustang's Offer of Settlement

A. The Settlement Provisions

Mustang submits that its April 11, 1986, settlement proposal is consistent with the Natural Gas Policy Act.[22] applicable Commission policy, and the public interest, and therefore should be approved by the Commission.[23] In support of this statement, Mustang asserts that the proposed settlement removes longstanding and detrimental financial uncertainty for Mustang, as well as providing substantial refunds and take-or-pay relief for El Paso.[24] Specifically, the major terms of the settlement provide for:

1. Refund by Mustang to El Paso of $3,000,000 inclusive of principal and interest.

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[22] 15 U.S.C. §§ 3301-3432 (1978).

[23] Motion of Mustang Fuel Corporation For Approval of Offer of Settlement and Settlement Agreement, (hereinafter "Mustang's Settlement"), Docket No. ST81-260-000, *et al.* (filed April 11, 1986) at 7.

[24] *Id.* at pages 8 and 9.

2. Concurrent agreement by El Paso and OG&E (a) to suspend all obligations [25] under the January 9, 1981, Gas Resale Agreement between El Paso and OG&E [26] for the period January 1, 1986, through December 31, 1987, and (b) to extend the primary term of that agreement to December 31, 1995.

3. Concurrent agreement by Mustang and El Paso (a) to suspend their obligations under their January 9, 1981, Gas Transportation Agreement until December 31, 1987, and (b) to negotiate in good faith a best-efforts transportation agreement to cover transportation, during this suspension period, of the quantity of natural gas desired by El Paso.

4. Concurrent agreement by El Paso and OG&E to attempt to reach agreement for the purchase of natural gas by OG&E and the sale of such gas by El Paso on a best efforts basis with the intent to augment OG&E's other supplies at a price near that of the then-concurrent spot market and until such time as OG&E may determine its natural gas requirements are satisfactorily fulfilled, but in no event for a period longer than the extended term of the Gas Resale Agreement.

5. Concurrent agreement by El Paso to take, on a best-efforts basis, OG&E's surplus gas at a price agreeable to OG&E and El Paso.

For the reasons stated below, we shall reject this settlement proposal.

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[25] This would include El Paso's two-year 24 BCF minimum take requirement.

[26] This agreement provides for El Paso's purchase from OG&E of the natural gas that Mustang transports for El Paso.

B. Comments on the settlement proposal

OG&E was the only participant to file comments on the proposed settlement.[27] OG&E states that it supports the settlement. OG&E and El Paso are signatories to the April 11, 1986 settlement, agreement, filed with the Commission as part of Mustang's motion.

C. Consideration of the merits of Mustang's proposal

All active participants in these proceeding have either supported Mustang's settlement proposal, or have not opposed it.[28] Accordingly, we find the proposal to be uncontested. Under Section 385.602(g)(3)[29] of the Commission's regulations, as a prerequisite to Commission approval, an uncontested settlement must be found to appear fair and reasonable and in the public interest.

Mustang posits several arguments to support its contention that the settlement is in the public interest. Initially, Mustang states that the settlement will resolve the longstanding uncertainty as to Mustang's rates for service to El Paso. This uncertainty, Mustang claims, has had an adverse impact upon its financial status and current and future planning. While the settlement may achieve the certainty of rates desired by Mustang, the instant order will have the same effect.

Secondly, Mustang argues that El Paso and its customers will derive significant benefits from (1) the im-

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[27] On May 29, 1986, El Paso filed a pleading styled as a motion for expedited consideration of Mustang's settlement proposal. However, El Paso's motion also contains what amounts to late-filed comments in support of the settlement. Pursuant to Rule 602(f)(2), 18 C.F.R. § 385.602(f)(2), comments were due by May 1, 1986. The Commission expects such comments to be properly identified and timely-filed. Accordingly, they have not been considered.

[28] 18 C.F.R. § 385.602(f)(3) provides that those who fail to file comments have waived all objections to an offer of settlement.

[29] 18 C.F.R. § 385.602 (1985) applies to written offers of settlement filed in any proceeding pending before the Commission.

mediate flow-through to El Paso's customers of the stipulated refund of $3,000,000 and (2) the suspension of El Paso's purchase and take obligations to OG&E for two years. A statement prepared by El Paso, included as Appendix C to Mustang's offer of settlement, estimates these combined savings over the two-year suspension period at $15,710,000.

However, the only benefit definitively provided for by the actual terms of the settlement agreement is the stipulated immediate refund of $3.0 million dollars. This figure, which is to be considered inclusive of both principal and interest, is completely unsupported and substantially below the roughly $7.2 million in principal alone due from just the minimum bill unlawful charges. The remaining $12.71 million of El Paso's estimate, described by El Paso as Gas Purchase Savings, is based upon unsubstantiated and speculative figures. To calculate these hypothetical savings, El Paso multiplied its contractual two-year minimum take obligation (from OG&E) of 24 BCF by the contract price of $2.72. The resulting product ($65.28 million) was listed as El Paso's Total Purchase Obligation in the event the settlement agreement was not approved. Then El Paso subtracted from this total Purchase Obligation the purported purchase gas costs for the same two-year period from alternative suppliers. These purported lower purchase gas costs were derived by multiplying El Paso's weighted average cost of gas (WACOG) from its April 1, 1986 PGA by its contractual two-year minimum take obligation of 24 BCF. The difference is the alleged savings.

We are unable to accept El Paso's unsupported $12.71 million figure for alleged future benefits as a substitute for certain refunds with interest probably totalling close to this alleged benefit. Mustang has provided no proof that it will actually pay less for alternate supplies or that El Paso would not be able to renegotiate its contract with OG&E to improve the price terms. El Paso has an on-

going obligation as a prudent purchaser to seek to obtain permanent, renegotiated reductions in purchase prices and take-or-pay obligations. Finally, the alleged settlement benefits fail to reflect the potential detriment of extending the OG&E contract with its take-or-pay obligation another four years. Therefore, we find the alleged settlement benefits of an inadequate, unsupported refund of $3.0 million and unsupported future savings are outweighed by the certain refund probably in excess of $10.4 million [30] (plus interest accrued over the 24-month amortization period) as provided by this order.

Finally, Mustang argues that this case presents certain issues that may not be repeated in current industry circumstances. Mustang goes on to state that because these issues may not re-arise that ". . . further consideration or litigation of those issues before the Commission or the Court of Appeals is not warranted if the Commission can dispose of these dockets by approval of a settlement."[31]

But this case has already completed the final stage before the Commission. In any event, approval of the settlement does not dispose of the very same type of rate and minimum bill issues in any proceedings covering Mustang's rates commencing May 1, 1984, such as Docket No. ST85-559-000, *et al.*[32] Moreover, even if certain is-

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[30] This figure is a rough estimate based upon the addition of the refunds due under this order as a result of payments pursuant to the unlawful minimum bill (approximately $7.2 million) with those due to rate charges (approximately $260,000). With interest, the total due at this time should be in excess of $10.4 million. The exact amount due will be established after Mustang submits its initial refund report.

[31] Mustang's settlement at 4.

[32] *See* 32 FERC ¶ 61,028 (1985). We note that on April 21, 1986, Mustang filed a petition in Docket No. ST81-260, *et al.*, for the approval of rates for the subject transportations on or after May 1, 1986.

sues may not be raised in future cases, that does not provide sufficient rationale for approval of this settlement offer. The settlement proposal does not adequately address the central issue of this case, i.e., did Mustang charge too much and, if so, what refunds are due? After having found the minimum bill provision to be not fair and equitable, our focus in this case is to assure that the appropriate refunds due to El Paso's customers are made. Mustang, through this settlement proposal, wishes to avoid a substantial refund payment in return for speculative benefits from a third party (OG&E) that, at best, may only approximate what will be directly refunded under this order. Because we are unable to find the settlement proposal fair and reasonable and in the public interest, approval of the settlement under the standards of the NGPA and our own regulations is not appropriate.

For the reasons stated above, we shall reject the settlement.

The Commission orders:

(A) Mustang's offer of settlement is rejected.

(B) The requests for rehearing are granted in part, and denied in part, all as more fully set forth in this order.

(C) Requests for rehearing not specifically addressed herein are denied.

(D) Ordering Paragraph (B) of our June 4, 1985 order, is vacated and refunds and refund reports shall be made as provided in Ordering Paragraph (E) below.

(E) Within 45 days of the issuance of this order, Mustang shall begin to refund, in accordance with the methodology set forth in the body of this order, the following amounts, plus interest calculated in accordance with the Commission's regulations: (i) all amounts collected in excess of the approved rates during October 1, 1982, through

April 30, 1984, and (ii) all amounts collected from October 1, 1982, through April 30, 1984, for volumes not actually transported on behalf of El Paso.

(F) Within ten days of Mustang's first refund installment, Mustang shall file an initial refund report showing the total refund amounts and supporting calculations. Within ten days after the final refund installment is made, Mustang shall file a refund report showing the amounts of refunds and interest paid.

Commissioner Trabandt *dissented.*

Appendix A

Alternative A

	Col. 1 *Total Actual Cost-of-Service Allocated to El Paso Using Projected Volumes*	*Col. 2* *El Paso's Actual Transmission Volumes (Mcf)*	*Col. 3* *El Paso's Unit Rate per Mcf*
Period I [1]	$8,845,105	18,129,678	48.79 cents
Period II [2]	$5,445,023	6,856,131	79.42 cents
Period III [3]	$8,219,579	21,152,127	38.86 cents

Alternative B

	Col. 1 *Total Actual Cost-of-Service Allocated to El Paso*	*Col. 2* *El Paso's Actual Transmission Volumes (Mcf)*	*Col. 3* *El Paso's Unit Rate per Mcf*
Period I [4]	$6,835,764	18,129,678	37.70 cents
Period II [5]	$3,731,743	6,856,131	54.43 cents
Period III [6]	$8,144,428	21,152,127	38.50 cents

[1] Mustang's Request for Rehearing, Appendix C, p. 1.

[2] *Id.*, Appendix D, p. 1.

[3] *Id.*, Appendix E, p. 1.

[4] *Id.*, Appendix H, p. 1.

[5] *Id.*, Appendix F, p. 1.

[6] *Id.*, Appendix G, p. 1. Mustang has changed the beginning of the period from May 23, 1983 to May 1, 1983, but for comparison purposes, we use the data provided.

Commission Order of June 4, 1985

	Cost-of-Service Allocated to El Paso Cogar Compressor	*Other*	*Total*
Period I [7]	$ —	$ —	$7,421,000
Period II [8]	$2,492,488	$7,445,542	$9,937,990
Period III [9]	$2,591,542	$5,583,668	$8,175,210

	El Paso's Projected Transmission Volumes (Mcf)		*El Paso's Unit Rate per Mcf*		
	Cogar Compressor	*Other*	*Cogar Compressor*	*Other*	*Total*
Period I	35,387,500	33,300,000	—	—	22.29 cents
Period II	35,387,500	34,020,000	7.04¢	21.89¢	28.93 cents
Period III	35,387,500	21,125,000	7.32¢	26.43¢	33.75 cents

Mustang's Rates Collected Subject To Refund

	Total Projected Cost-of-Service Allocated to El Paso	*El Paso's Projected Transmission Volumes (Mcf)*		*El Paso's Unit Rate per Mcf*
		Cogar Compressor	*Other*	
Period II [10]	$11,062,000	35,387,500	34,020,000	32.21 cents
Period III [11]	$ 8,266,000	35,387,500	21,125,000	34.30 cents

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[7] The Commission's June 4, 1985 order proposed no change to the settlement allocation methodology, cost-of-service or rate approved in ST81-261-000 but because Mustang's appendices recompute those numbers for Period I, the settlement figures are reproduced here for comparative purposes. The cost-of-service used in the settlement was taken from Appendix C to Mustang's May 1, 1981 Petition for Rate Approval. Appendix C does not break out the cost of service and rates for the Cogar Compressor Station and Other facilities used by El Paso.

[8] Commission order of June 4, 1985, Appendix A, 31 FERC at p. 61,540.

[9] *Id.*, Appendix B, 31 FERC at p. 61,543.

[10] Mustang's September 30, 1982 Application for Approval of Revised Rate, Schedule No. 1, p. 1.

[11] Mustang's May 23, 1983 Application for Approval of Revised Rate, Schedule No. 1, p. 1.

APPENDIX D

Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1988):

§ 3371. Authorization of certain sales and transportation

(a) Commission approval of transportation.—

(1) Interstate pipelines—

(A) In general.—The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of—

(i) any intrastate pipeline; and

(ii) any local distribution company.

(B) Just and reasonable rates.—The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act).

(2) Intrastate pipelines.—

(A) In general.—The Commission may, by rule or order, authorize any intrastate pipeline to transport natural gas on behalf of—

(i) any interstate pipeline; and

(ii) any local distribution company served by any interstate pipeline.

(B) Rates and charges.—

(i) Maximum fair and equitable price.—The rates and charges of any intrastate pipeline with respect to any transportation authorized under subparagraph (A), including any amount computed in accordance with the rule prescribed under clause (ii), shall be fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which

interstate pipelines would be permitted to charge for providing similar transportation service.

(ii) Commission Rule.—The Commission shall, by rule, establish the method for calculating an amount necessary to—

(I) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, delivery, or similar service provided by such pipeline in connection with any transportation of natural gas authorized under subparagraph (A); and

(II) provide an opportunity for such pipeline to earn a reasonable profit on such services.

(Pub.L. 95-621, Title III, § 311(a), Nov. 9, 1978, 92 Stat. 3388.)

APPENDIX E

Regulations under the Natural Gas Policy Act of 1978:

Subpart C—Certain Transportation by Intrastate Pipelines

§ 284.121 Applicability.

This subpart implements section 311(a)(2) of the NGPA and applies to the transportation of natural gas by any intrastate pipeline on behalf of:

(a) Any interstate pipeline, or

(b) Any local distribution company served by any interstate pipeline.

§ 284.122 Transportation by intrastate pipelines.

(a) Subject to the provisions of this subpart and the applicable conditions of Subpart A of this part, any intrastate pipeline may, without prior Commission approval, transport natural gas on behalf of:

(1) Any interstate pipeline; or

(2) Any local distribution company served by an interstate pipeline.

(b) No rate charged for transportation authorized under this subpart may exceed a fair and equitable rate under § 284.123.

(c) Any intrastate pipeline engaged in transportation arrangements authorized under this section must file reports as required by § 284.126.

[Order 436, 50 FR 42495, Oct. 18, 1985]

§ 284.123 Rates and charges.

(a) *General rule.* Rates and charges for transportation of natural gas authorized under § 284.122(a) shall be fair and equitable as determined in accordance with paragraph (b) of this section.

(b) *Election of rates.* (1) Subject to the conditions in §§ 284.8 and 284.9 of this chapter, an intrastate pipeline may elect to:

(i) Base its rates upon the methodology used:

(A) In designing rates to recover the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service) included in one of its then effective firm sales rate schedules for city-gate service on file with the appropriate state regulatory agency; or

(B) In determining the allowance permitted by the appropriate state regulatory agency to be included in a natural gas distributor's rates for city-gate natural gas service; or

(ii) To use the rates contained in one of its then effective transportation rate schedules for intrastate service on file with the appropriate state regulatory agency which the intrastate pipeline determines covers service comparable to service under this subpart.

(2) (i) If an intrastate pipeline does not choose to make any election under paragraph (b) (1) of this section, it shall apply for Commission approval, by order, of the proposed rates and charges by filing with the Commission the proposed rates and charges, and information showing the proposed rates and charges are fair and equitable. Each petition for approval filed under this paragraph must be accompanied by the fee set forth in § 381.403 or by a petition for waiver pursuant to § 384.106 of this chapter. Upon filing the petition for approval, the intrastate pipeline may commence the transportation service and charge and collect the proposed rate, subject to refund.

(ii) 150 days after the date on which the Commission received an application filed pursuant to paragraph (b) (2) (i) of this section, the rate proposed in the ap-

plication will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service, unless within the 150 day period, the Commission either extends the time for action, or institutes a proceeding in which all interested parties will be afforded an opportunity for written comments and for the oral presentation of views, data and arguments. In such proceeding, the Commission either will approve the rate or disapprove the rate and order refund, with interest, of any amount which has been determined to be in excess of those shown to be fair and equitable or in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(iii) A Commission order approving or disapproving a transportation rate under this paragraph supersedes a rate determined in accordance with paragraph (b)(1) of this section.

(c) *Treatment of revenues.* The Commission presumes that all revenues received by an intrastate pipeline in connection with transportation authorized under § 284.122(a) and computed in accordance with paragraph (b)(1) of this section have been or will be taken into account by the appropriate state regulatory agency for purposes of establishing transportation charges by the intrastate pipeline for service to intrastate customers.

(d) *Presumptions.* If the intrastate pipeline is charging a rate computed pursuant to § 284.123(b)(1), the rate charged is presumed to be:

(1) Fair and equitable; and

(2) Not in excess of the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(e) *Filing requirements*—(1) *General rule.* Except as provided in paragraph (e)(2) of this section, within 30

days of commencement of new service, any intrastate pipeline that engages in transportation arrangements under this subpart must file with the Commission a one-time statement that describes how the pipeline will engage in these transportation arrangements, including operating conditions, such as, quality standards and financial viability of the shipper. If the pipeline changes its operations under this subpart, it must amend the statement and file such amendments not later than 30 days after commencement of the change in operations.

(2) *Exception.* Any intrastate pipeline that engages in transportation arrangements authorized under this subpart before December 15, 1985, must file the statement described in paragraph (e)(1) not later than February 1, 1985. Any amendments to this statement must be filed in accordance with paragraph (e)(1).

[44 FR 52184, Sept. 7, 1979, as amended at 44 FR 66791, Nov. 21, 1979; Order 394, 49 FR 35364, Sept. 7, 1984; Order 436, 50 FR 42496, Oct. 18, 1985; 50 FR 52276, Dec. 23, 1985]

§ 284.124 Terms and conditions.

Contracts for the transportation of natural gas authorized under this subpart shall provide that the transportation arrangement is subject to the provisions of this subpart.

§ 284.125 Effectiveness of existing transportation services.

(a) Any transportation service authorized and commenced on or before October 9, 1985, under this subpart or § 284.222 of Subpart G as such subparts were effective before November 1, 1985, may be continued under the terms and conditions that applied prior to November 1, 1985, with the exception of reporting requirements, until the earlier of:

(1) The expiration of the original or extended terms of any authorized transportation arrangement as it was in effect on the date of issuance of this order.

(2) October 9, 1987.

(b) Effective November 1, 1985, the reporting requirements of § 284.126 apply to all transportation authorized under this subpart which commenced either prior to, or subsequent to, November 1, 1985.

[Order 436, 50 FR 42496, Oct. 18, 1985; 50 FR 45908, Nov. 5, 1985]

§ 284.126 Reporting requirements.

(a) *Initial full report.* Within thirty days after commencing transportation under by this subpart, an intrastate pipeline must file with the Commission and the appropriate state regulatory agency an initial full report, signed under oath by a senior official of the company, consisting of an original and five conformed copies to the Commission, containing the following information:

(1) The identity of the intrastate pipeline and the identity, title, mailing address, and phone number of the person or persons with whom to communicate about the transportation arrangement;

(2) A general description of the intrastate pipeline's existing operations;

(3) A description of the transportation including:

(i) The identity of the parties;

(ii) The dates of commencement and projected termination of the service;

(iii) The estimated total and maximum daily quantities of natural gas to be transported by the intrastate pipeline;

(iv) The points between which the natural gas is to be transported by the intrastate pipeline;

(v) The location (*i.e.*, state) of the original source and the location (*i.e.*, state) of the ultimate delivery point of the gas; and

(vi) The rate to be charged.

(4) A statement of the basis upon which the intrastate pipeline determined that the service provided is comparable to service provided for under that rate schedule, if the intrastate pipeline is charging a rate under § 284.123(b)(1)(ii) of this chapter; and

(5) A statement that:

(i) The appropriate state regulatory agency has been notified that the Commission presumes that all revenues received by an intrastate pipeline under rates for transportation under § 284.122 established under § 284.123 (b)(1) of this chapter, have been or will be taken into account by the appropriate state regulatory agency for purposes of establishing transportation rates charged by that intrastate pipeline for service to intrastate customers; and

(ii) Any contract for the transportation arrangement provides that it is subject to this subpart.

(6) If such transportation is provided to a customer that is located in the service area of a local distribution company, a statement that the intrastate pipeline has notified the local distribution company and the local distribution company's appropriate state regulatory agency in writing of the proposed transportation prior to commencement.

(b) *Subsequent reports.* (1) An intrastate pipeline that files an initial report under paragraph (a) of this section must amend that report to reflect any material change with pertinent transportation arrangement.

(2) Any changes in the initial report required by this paragraph must be filed with the Commission and the

appropriate state regulatory agency within 30 days of the material change, and must be signed under oath by a senior official of the company, and consist of an original and five conformed copies to the Commission.

(c) *Annual report.* Not later than May 1 of each year, each intrastate pipeline must file an annual report with the Commission and the appropriate state regulatory agency that contains, for each docketed transportation service provided during the preceding calendar year under § 284.122, the following information:

(1) The docket number assigned to the transaction;

(2) Total volumes transported for the transaction; and

(3) Total revenues received for the transaction.

(d) *Notification of termination.* Not later than thirty days after the termination of any transportation arrangement authorized under § 284.122, the intrastate pipeline must file with the Commission and with the appropriate state regulatory agency a statement, consisting of an original and five conformed copies to the Commission, including the following information:

(1) The docket number assigned to the transaction and the date the transaction was terminated;

(2) The total volumes transported under the arrangement;

(3) The total revenues received; and

(4) A statement certifying that the service was provided under the terms and conditions previously reported in that docket.

(e) *Filing fees.* Each initial report required by paragraph (a) of this section must be accompanied by the fee set forth in § 381.404 of this chapter, or a petition for waiver under § 381.106 of this chapter.

(f) *Reporting form.* Each initial report filed under paragraph (a) of this section and each subsequent report filed under paragraph (b) of this section must utilize FERC Form No. 549-ST.

[Order 436, 50 FR 42496, Oct. 18, 1985, as amended at 50 FR 52276, Dec. 23, 1985; Order 458, 51 FR 44284, Dec. 9, 1986]

APPENDIX F

Pursuant to Rule 28.1, Petitioner lists parent companies (other than wholly owned subsidiaries) and affiliates. The parent corporation is Mustang Fuel Corporation. As of January 1, 1989, the appellant in the proceeding below (Mustang Energy Corp.) was merged into Mustang Production Company which changed its name to Mustang Fuel Corporation. The subsidiaries and affiliates of Mustang Fuel Corporation not wholly owned are:

Mustang Fuel Corporation of Oklahoma
Technical Industries, Inc.